IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

No. 77-393

THOMAS R. FADELL, PETITIONER

-vs-

MINNEAPOLIS STAR AND TRIBUNE COMPANY, INC., GEORGE CRILE, ANNE CRILE, JOHN COWLES, JR., RUSSELL BARNARD AND ROBERT SHNAYERSON, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SEPTEMBER TERM 1977

No. _____

THOMAS R. FADELL, PETITIONER

-vs-

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Cappeals for the Seventh Circuit herein, entered in the above entitled case on June 16, 1977.

OPINION BELOW

The opinion of the Seventh Circuit is reported in 557 F.2d 107 (7th Cir. 1977). It is set out below, excluding the caption, in its entirety:

SPRECHER, Circuit Judge. We are required to review the application of the New York Times rule to an alleged defamatory publication relating to a public official.

This is an appeal from the entry of a summary judgment in favor of all of the defendants in a libel action brought by an elected public official, the tax assessor of Calumet Township, Lake County, Indiana, based upon a nine-page article published in the November, 1972 issue of Harper's Magazine entitled "A Tax Assessor Has Many Friends -- The Story of Tom Fadell, his rise to power in Gary, Indiana, and why he will probably stay there."

There was no dispute that the plaintiff was a public official subject to the application of the New York Times rule that the First and Fourteenth Amendments prohibit a public official from recovering damages in a civil libel action for defamatory falsehoods relating to his official conduct unless he proves that the statements were made with actual malice--that is, with knowledge that they were false or with reckless disregard of whether they were false or not. New York Times Co. v. Sullivan 376 U.S 254, 279-280 (1964). New York Times requires that actual malice be shown with "convincing clarity." Id. at 285-286.

Where the New York Times rule is applicable, the Supreme Court has required that an appellate court make an independent examination of the whole record to determine whether it could constitutionally support a judgment for the plaintiff "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." Id. at 284-285.

In Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir. 1976), we accepted the following test enunciated in the concurring opinion of Judge Wright in Wasserman v. Time, Inc. 424 F.2d 920, 922-923 (D.C. Cir 1970), for applying the "convincing clarity" standard in summary judgment situations:

> Unless the court finds on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant.

In Grzelak v. Calumet Publishing Co., 543 F.2d 579,(7th Cir. 1975), we added that the "question for this Court to determine on appeal is whether the pleadings and affidavits show that the material facts about which there can be no genuine issue entitle defendant to judgment as a matter of law."

Inasmuch as the pretrial record in this case is unusually voluminous, the court below was faced with a gigantic task in measuring the plaintiff's contentions of the existence of genuine issues against the pretrial affidavits, depositions and other documentary evidence. This task was fulfilled by that court with painstaking detail and scrupulous documentation in weighing each contention of the plaintiff against the whole record. The lower court's diligence, as well as that of all counsel both when in the lower court and in presenting this appeal, have enabled us to

be guided through the vast record in order to fulfill our appellate function.

The plaintiff had received an advance galley proof of Harper's Magazine article from an unknown source on October 14, 1972 and two days later he notified the magazine's officials of his intention to sue for libel. On October 27, the plaintiff sent a "Notice of Libelous Publication" to Harper's Magazine, complaining of 24 allegedly libelous passages in the article. The 24 passages were incorporated in the complaint filed in the lower court on December 13, 1972. On October 11, 1974, the plaintiff filed an amended complaint again incorporating the 24 passages but adding that "the defendants inferred in said article that plaintiff was a member of the 'Mafia' or had dealings and/or connection with the 'Mafia'...". The lower court found that "(t)hese passages plus additional statements complained of at Fadell's deposition comprise the bases for this lawsuit."

The defendants all joined in two motions for summary judgment, each supported by a memorandum, the lengthier one being 116 pages long and referring to the pretrial documentation relating to the 24 original charges and to 21 additional statements referred to in the plaintiff's deposition. Supporting the defendants motions for summary judgment were seven volumes of material containing documentary sources for each disputed statement. Volumes I through III consist of 33 sets of the author Crile's handwritten interview notes covering 1128 pages. Volume IV consists

of 17 transcripts covering 418 pages of tape recorded interviews. Volume V contains 285 pages of copies of Internal Revenue documents which were given to Crile. Volume VI contains 261 pages and Volume VII 80 pages of miscellaneous documents obtained by Crile or reviewed by him during the course of preparing the disputed article. Source material was provided for all 69 persons interviewed by Crile, either in the seven volumes filed with the summary judgment motions or in the depositions of 23 witnesses covering 5,671 pages. Crile was questioned for eight days and the transcript of his deposition covers 1,443 pages. He also responded to 341 interrogatories.

The plaintiff responded to the defendants' motion for summary judgment with a 214-page memorandum in opposition to summary judgment, supported by three volumes containing 133 attachments, including about 50 affidavits and relying upon 22 alleged false and defamatory statements in the article. The defendants filed a brief response to the opposition.

The lower court carefully analyzed all of the pretrial material and entered four separate orders on December 1, 1976. The first was the summary judgment order in favor of the defendants and against the plaintiff, which is the order appealed from here. The second document was a memorandum opinion which was published in 424 F. Supp. 1075-1088 (N.D. Ind. 1976), and covers 14 pages in the Federal Supplement. All parties had submitted proposed findings of fact and conclusions of law to the district court, which adopted the two

of those submitted by the defendants. The findings and conclusions submitted by the publisher defendants and signed by the court on December 1, 1976 consisted of 25 findings and 2 conclusions. The findings and conclusions submitted by the author defendant and signed by the court consisted of 49 findings and 10 conclusions. All of the plaintiff's contentions are considered and resolved, including the "Mafia" matter (Finding No. 47).

With the guidance of these documents and the briefs on appeal we have examined the whole record and affirm the lower court. We also adopt as our own the lower court opinion at 425 F. Supp. 1075, including the conclusion that "a careful review . . . (of the record) reflects no actual malice whatsoever as that term is contemplated in New York Times v. Sullivan and its progeny." Id. at 1088. Summary judgment for the defendants was warranted by applying the tests we have established in Carson and Grzelak, supra.

We note finally that although the plaintiff attempts to surmount the obstacles imposed by New York Times, his major thrust continually goes to the truth or falsity of the published statements rather than to the basic problem of whether they were published with actual malice. Factual error is inevitable in free debate and must be countenanced in order to give freedom of expression "breathing space." New York Times Co. v. Sullivan, 376 U.S. 254, 271-272 (1964). A rule limiting constitutional protection to only true statements would lead to self-censorship because

difficulty in proving truth would cause those voicing criticism to "steer far wider of the unlawful zone." Id. at 279.

As Chief Judge Kaufman recently said in Edwards v. National Audubon Society, Inc., ...F.2d..., (Nos. 77-1026/7, 2d Cir., decided May 25, 1977), "the interest of a public figure in the purity of his reputation cannot be allowed to obstruct that vital pulse of ideas and intelligence on which an informed and self-governing people depend."

JUDGMENT AFFIRMED.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 16, 1977. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I

Whether the Appellate Court applied the correct standard of review, i.e., that the plaintiff must prove actual malice at the summary judgment stage of litigation, in determining whether the District Court erred in granting summary judgment to the author-publisher defendants.

II

Whether proof by affidavits to show that numerous defamatory statements which appeared in the article in question and which were attributed to various sources were never made by those sources or were distorted and misstated by the author is sufficient to show publication with "actual malice" for purposes of summary judgment.

III

Whether defamatory misstatements of a defendant-author's own notes as well as factually unsupported defamatory conclusions drawn by the author but published as "facts" by him are sufficient to show "actual malice" for purposes of summary judgment.

IV

Whether a publisher of highly defamatory material which clearly makes substantial danger to the reputation of the public official apparent has a duty to investigate the sources and accuracy of information where the material being published is not "hot news".

V

Whether a publisher of highly defamatory material who has been put on notice that an

article is false and defamatory prior to repeated publication of the article may rely solely on the author's representations of accuracy without conducting an independent investigation.

VI

Whether a positive showing that an author published as "fact" numerous false statements, misstated or twisted statements of others, and reached defamatory conclusions from innocuous information is sufficient to demonstrate "actual malice" for purposes of summary judgment.

VII

Whether an author who goes beyond the disinterested reporting of news and launches a personal attack against a public official may claim immunity underthis Court's decision in New York Times v. Sullivan.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

The libel action which forms the basis of this appeal was brought by Thomas R. Fadell for alleged false and defamatory statements made about him in the November, 1972 issue of Harper's Magazine in an article entitled "A Tax Assessor Has Many Friends." By its own characterization, as stated in the article's sub-title, it purported to be "The Story of Tom Fadell, his rise to power in Gary, Indiana, and why he will probably stay there." Numerous issues of the Harper's Magazine which contained the article carried a bright red tag on the cover which announced "Crooked Taxes in Gary, Indiana."

On Saturday, October 14, 1972, Fadell received an advance galley proof of the Harper's article from an anonymous source. (Fadell Dep. pp 247-49). He had received no correspondence from Harper's up to this time, and this was the first time he had seen any of the charges made against him in that publication. On Monday, by letter dated October 16, 1972, Fadell notified Harper's that the galley proof he received was false, defamatory, and libelous. Upon receipt of this letter. Harper's did nothing to stop the circulation of the article. (Barnard Dep. pp. 217-219). On October 27, 1972, Fadell sent a Notice of Libelous Publication to

Harper's wherein he set out twenty-four (24) libelous points and explained briefly how they were false and inaccurate. (Amended Complaint, Exh. No. 5 attached thereto and made a part thereof). Harper's again did nothing to stop the circulation and publication of the article, or the re-orders of it.

Thomas Fadell filed this libel action in the United States District Court for the Northern District of Indiana on December 13, 1972 and by leave of that Court, filed an amended complaint on October 11, 1974.

Parties

The petitioner, Thomas R. Fadell, is and was during all times relevant hereto, the duly elected Assessor of Calumet Township, Lake County, Indiana. He had been elected to that position in 1958, and re-elected in 1962, 1966, 1970 and 1974. A practicing attorney, Fadell received his law degree from Tulane University School of Law, and while at Tulane, was elected student president, was a member of the Law Review, and received scholastic recognition through initiation in the Order of Coif, a national honorary legal society. Having served this country as a Lieutenant in the United States Marine Corps, Fadell returned to Gary, Indiana, to pursue the practice of law.

Fadell maintains an active legal practice today, as he has done since 1954. He is married and the father of four daughters.

Defendants Below

Named as defendants in this libel action are the article's author, George Crile; Minneapolis Star and Tribune Company, Inc., a corporation incorporated under the laws of the State of Minnesota having as its principle place of business the State of New York, and having as a division, Harper's Magazine Company; John Cowles, Jr., the President and Chairman of the Board of the Minneapolis Star and Tribune Company, Inc ; Russell Barnard, the Publisher of Harper's Magazine; Robert Shnayerson, the Editor-in-Chief of Harper's Magazine; and Anne Crile, the wife of author George Crile.

The author of the article which forms the basis of this libel action, George Crile, was twenty-six years old at the time of publication. (Ridder Dep. p. 7). He had first begun working for the Gary Post-Tribune newspaper in March of 1970. (Crile Dep. p. 52). He was employed there in 1970 and most of 1971. Late in 1971, Walter Ridder, the Post-Tribune's publisher, transferred Crile to the Ridder Newspaper's Washington Bureau. (Ridder Dep. p. 7, 53). Onereason for that transfer was because the editors at the Post-Tribune disliked and resented Crile. (Ridder Dep. p. 52-53). In January of 1972, Ridder fired Crile. (Crile Dep. p. 81). Soon thereafter, Crile began working with Nelson Aldrich, associate editor of Harper's Magazine, on the article complained of herein. (Aldrich Dep. p. 17-19).

Prior to his employment at the Gary Post-Tribune newspaper, Crile attended Trinity College where he received his bachelor of arts degree. (Crile Dep. p. 11-12). He then jointed the Marine Corps in a reserve program to study the Russian language at the Defense Language Institute in Monterey, California. (Crile Dep. p. 39). Crile stated upon deposition that while in California, he saw a psychiatrist one time. (Crile Dep p. 1192). However, his wife stated she believed he saw a psychiatrist for a period of three to four months. (Anne Crile Dep. p. 7). Since the publication of the Harper's article, Crile has sought psychiatric treatment on thirty to forty occasions. (Crile Dep. p 1190). He has refused to explain the nature of his psychiatric problem. (Crile Dep. p. 1190). Crile also admitted to the use of marijuana, after having been ordered by the federal district court to answer questions relating to his drug use, but refused to comment on his use of other controlled substances, specifically LSD, heroin, etc. (Crile Dep. p. 1210, 1217).

Summary Judgment

The respondents, as defendants below, filed three motions for summary judgment; one for the author George Crile, one for his wife, Anne Crile, and one for the remaining defendants (collectively referred to hereafter as Harper's). In support of their motions,

the respondents submitted seven volumes of exhibits consisting primarily of photographic copies of George Crile's note pad, secondary sources such as newspaper articles, etc , concerning Gary, Indiana, and rap sheets purportedly given to the author by a Mr. Oral Cole who had gathered this information for a purpose other than the Harper's article. (the IRS documents). No affidavits by any of respondent's alleged sources were submitted by respondents to show that Crile had actually talked to those sources or, if he did talk with them, to show that he accurately reported what they had told him. Respondents directed their memorandum to twenty-four passages in the article which petitioner complained of in his Notice of Libelous publication. Respondents did not, however, discuss all the allegedly libelous passages raised by petitioner in his complaint as amended.

The petitioner, Thomas Fadell, as appellant below, filed his combined Motion and Memorandum (consisting of 232 pages) in Opposition to Summary Judgment, and accompanied with it three volumes of exhibits and affidavits to show that the respondents published false and defamatory statements with "actual malice". (Fadell S.J. Memo. Vol. I-III). Of those exhibits, approximately fifty are affidavits from various persons respondents contend were Crile's sources of information or were involved in the acts which Crile wrote about in the Harper's article. (Fadell S.J. Exh. Vol. I-III). In his memorandum, petitioner

cited twenty-two specific false and defamatory statements which either directly or indirectly referred to him and caused injury to his reputation. Those points are set out below:

1. Continued circulation of Harper's after having received notice that the publication was false and libelous.

2. Tag - "Crooked Taxes in Gary, Indiana".

3. "Harper's Releases" - relating to two pre-publication releases written by Harper's defendants and which stated defamatory falsehoods that were not even stated in the Harper's article.

4. "Run off the Road" -referring to innuendo in the article that petitioner was somehow involved in an alleged attempt to have George Crile rune off the expressway.

5. "Mafia" - referring to statements in the article which suggested that petitioner had ties to organized crime.

6. "Post-Tribune Real Estate Assessment" - relating to Crile's statements in the article saying the Post-Tribune newspaper was grossly underassessed, that

petitioner was responsible, and that a "business deal" had been worked out with petitioner.

7. "Thrown out of Post-Tribune" - referring to a statement in the article which said petitioner got into an argument at the Post-Tribune newspaper, was thrown out and then arbitrarily raised its assessment because of the argument.

8. "Gary-Hobart Water" - referring to statements in the article which relate how petitioner improperly assessed the water utility company.

9. "U.S. Steel Tax Break" - referring to Crile's charge in the article that petitioner had improperly and intentionally underassessed the steel mill.

10. "Unexplained Drop- Business Arrangement and Mysterious Reductions" - referring to a passage in the article which stated that petitioner improperly lowered assessments in exchange for some "business arrangement" for his personal benefit.

11. "School and City Crises" - referring to passages in the article which state that petitioner submitted phony assessment figures in order to destroy the Gary City budget and bring about a financial crises.

12. "Destruction of Records"- referring to Crile's statement that petitioner illegally destroyed all assessment records by having them buried in the Gary City Dump.

13. "2% Fund and Kickbacks from Employees" -feferring to statements in the article which charged petitioner with using public monies for his personal use and with forcing employees of the assessor's office to illegally kickback money to him.

14. "Part-Time Workers Paid to Campaign" - relating to Crile's statement that petitioner paid monies from public funds in order to have people campaign for him.

15. "Screw and Bolt - Soliciting Bribes" - referring to passages in the article where respondents state that petitioner shook down taxpayers for lower assessments.

16. "I'm the Law" - referring to a statement in the article which depicted petitioner as usurping the law in Lake County, Indiana.

17. "Inference - Small Business Empire Gained by Illegal Means" Referring to passages in the article suggestive of petitioner improperly becoming prosperous through misuse of his public office.

18. "Conduits to Channel Money" - referring to statements in the article which infer petitioner set up dummy corporations in order to divert public funds to his own use.

19. " Inference that Grand Jury should have Indicted Fadell" - referring to numerous passages which, in their totality, suggest petitioner brought pressure upon grand jury in order to prevent it from indicting him.

20. "Threats to IRS Agents" - referring to statements in the article which assert that petitioner improperly raised assessments of IRS agents.

21. "Fadell's Interference with Electoral Process" - referring to numerous passages which depict petitioner as improperly interferring with the Gary City Primary elections in 1971.

22. "Oral Cole's Personal Disaster" - referring to the inferences in the article that petitioner directly caused the personal destruction of the life of an IRS agent.

Both petitioner and respondents submitted proposed findings of fact and conclusion of law to the District Court below. On December 1, 1976, the District Court judge granted summary judgment in favor of all the defendants and adopted respondent's findings of facts and conclusions of law. Additionally, the Court below entered a Memorandum Opinion wherein it stated its reasons for so ruling.

Petitioner, as appellant below, appealed from that decision to the United States Court of Appeals, Seventh Circuit. After having heard oral argument, the Appellate Court affirmed the decision of the District Court by order dated June 16, 1977. It is from that decision that appellant below, as petitioner, applies to this Court for review.

REASONS FOR GRANTING WRIT

Conflicts Between the Circuits, The Circuits and Supreme Court, and Failure to Follow Precedent

Since the decision of this Court in the landmark case of New York Times v Sullivan, 376 U.S 254 (1964), no definitive statement

has ever been promulgated which states the correct standard of proof which a public official plaintiff must meet in order to survive summary judgment. From that decision, it is clear that in order for the public official plaintiff to ultimately prevail in a defamation case he must show that " the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. 376 U.S. at 279-80.

After the Times decision, this Court has defined, clarified, and exemplified what it meant by "actual malice." For example, in Garrison v. Louisiana, 379 U.S. 64 (1964), this Court explained that "only those false statements made with the high degree of awareness of their probably falsity demanded by New York Times may be the subject of either civil or criminal sanctions." Id. at 74. In Curtis Publishing Co. v. Butts, 338 U.S. 130 (1967) this Court further stated that:

> "...evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions."

St. Amant v Thompson, 390 U.S. 727, 731 (1968) (emphasis added). This Court even went so far as to adopt some examples of "reckless disregard" previously cited by Mr. Chief Justice Warren in his concurring opin-

ion in Curtis Publishing Co. v. Butts, 388 U. S. 130 (1967), wherein he stated that recklessness can be found where a story is fabricated by the defendant; is the product of the defendant's imagination; is based wholly on an unverified anonymous telephone call; is so inherently improbable that only a reckless man would have put it in circulation; or where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. St. Amant, supra, 390 U.S. at 732.

However, even though these holdings helped establish guidelines as to what ultimately constitutes "actual malice,", there still has been no definitive statement by this Court directed to the question of the public official plaintiff's burden and the extent of proof he must offer to defeat a defendant's motion for summary judgment. To date, this Court's only guideline as to that question has been that there is no simple method to determine whether "actual malice" exists, and that each case must be scrutinized on an individual basis. Time, Inc. v. Hill, 385 U.S. 374, 390-91 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130, 148 (1967). As a result of this vagueness, the lower courts have begun to fashion and adopt their own standards for determining the respective parties' burdens at the summary judgment stage in litigation. In Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970), the Appellate Court there announced the following standard of review:

We thus proceed to an examination of the record, viewing it and the inferences which might be drawn therefrom in the light most favorable to Bon Air* (the party opposing summary judgment), to ascertain whether "the record established by (Bon Air) demonstrate(s) that there is no issue of fact from which a jury could find 'actual malice'." Time, Inc. v. McLaney, supra, 406 F.2d at 567; see Rule 56(c), Fed. R. Civ. P. (parenthetical added).

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* Citing as authority United States v. Diebold, Inc. 369 U S. 654, 655 (1962); Goldwater v. Ginzburg, 414 F.2d at 337; Time, Inc. v. McLaney, 406 F.2d at 571-72.

The federal trial court for the Northern District of Illinois appears to have adopted this standard by holding:

> To survive summary judgment proceedings it is necessary that he (plaintiff) offer some evidence upon which a jury could find convincing clarity* of actual malice or reckless disregard. The decisions require that he come forward with evidence of the defendants' state of mind; in effect, he must prove a negative. There must be "sufficient evidence to permit the conclusion that

> the defendant in fact entertained serious doubts.**
>
> * * *
>
> The plaintiff must bear the burden of coming forth with affirmative evidence of facts indicating the defendants' probable knowledge of the falsity.

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* Citing New York Times v. Sullivan, 376 U.S 254, 286 (1964).

** Citing St. Amant v. Thompson, footnote 12 supra.

Novel v. Garrison, 338 F. Supp. 977, 980 (N.D. Ill 1971). (Emphasis added.) Additionally, it should be noted that these holdings were based on Supreme Court decisions stating that the public official plaintiff's burden on summary judgment is to bring forth some evidence, or sufficient evidence, or affirmative evidence of facts indicating the defendants' probable knowledge of falsity. A California district court stated this standard in the following language:

> "...that it (the plaintiff) had sufficient probative substance to be able litigably to give rise to an issue of fact on whether such malice actually existed or not..."

Hensley v. Life Magazine, Inc., 336 F. Supp. 50 (M.D.C.I. 1971), citing United Medical Lab, Inc. v Columbia Broadcasting System, 404 F.2d at 712 (1968) (emphasis added).

These pronouncements would seem to indicate that at the summary judgment stage, the function of the court is to review the evidence to see if some portion of it is of such a nature that a jury (or the finder of fact) could determine that the publication was made with "actual malice." If any such evidence is submitted, then the courts function is to allow the jury, after a trial on the merits of the case, to determinewhether 'actual malice" existed. See, e.g., Speake v. Tofte, 327 F. Supp. 200 (D.D.C. 1971); Arizona Biochemical Co. v. Hearst Corp, 302 F. Supp. 412 (S.D.N.Y. 1969), citing St. Amant v. Thompson, supra, and Pope v. Time, Inc., 354 F 2d 558 (7th Cir. 1965) cert. denied 384 U S. 909 (1966); Goldwater v. Ginzburg, 261 F. Supp. 784 (S.D.N.Y. 1966) aff'd 414 F.2d 324 (2d Cir. 1969); and Dodd v. Pearson, 277 F. Supp. 469 (D.D.C. 1967).

However, in the present case, both the Federal District Court and the Appellate Court imposed a much stricter burden of proof on the plaintiff, petitioner herein. The District Court held that for purposes of summary judgment, the plaintiff must prove "actual malice" with 'convincing clarity:"

> "Thus, in order to prevail in this case, the plaintiff must establish that Harper's either knew that allegedly defamatory statements in the article were false, had a high degree of awareness of their probable falsity, or entertained serious doubts as to the truth of the statements."

(Memorandum Opinion, Appendix p. C-22). The District Court reached this conclusion by applying the ultimate test set forth by this Court in Gertz v. Robert Welch, Inc., supra, which alluded to:

> "... clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth."

Gertz v. Robert Welch Inc., 418 U.S. 323, 342 (1974). The Court of Appeals also applied this standard of proof against the petitioner, holding that:

> "Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant, " citing Wasserman v. Time, Inc., 424 F. 2d 920 922-23, (D.C. Cir. 1970) (concurring opinion).

(Opinion, Court of Appeals; Appendix p. A-4).

It is readily apparent that two distinct burdens of proof are being imposed by the various courts at the summary judgment level. The first burden of proof, and that which petitioner submits is the correct standard, is that the District Court must review the summary judgment materials to see whether some evidence has been offered from which a jury could find "actual malice." This is a less stringent burden than that ultimately imposed on the public official plaintiff at the trial of the case and it is this burden that the courts cited above have advanced. The second burden of proof, as imposed by the district and appellate courts in this case equates to a full blown trial on the merits through affidavits, depositions, and the like whereby the plaintiff must actually prove the existence of actual malice in order to proceed to trial, rather than submit some proof from which the jury could find it.

Due to the fact that the function of the Court reviewing the evidence at this crucial stage of public official defamation litigation is unclear; the fact that the various Circuit Courts are applying different standards of review; and the fact that the district and appellate courts in this case have applied a standard of review which appears to be contrary to that standard implied by this Court in New York Times v. Sullivan and St. Amant v. Thompson, petitioner respectfully prays that this Court review the decision herein and grant this Petition for Writ of Certiorari.

II

THE COURTS BELOW ERRONEOUSLY DISREGARDED PETITIONER'S PROOF FROM WHICH A JURY COULD FIND ACTUAL MALICE WITH CONVINCING CLARITY

Admittedly, a public official plaintiff's burden of proof in a defamation action is indeed difficult regardless of the standard of proof required of him by the court. No author-defendant will admit on deposition that he published false facts knowingly. Nor will such a litigant admit that he acted in reckless disregard of whether his publication was true or not. Conversely, and for much the same reasons, the courts have consistently rejected such defendants protestations of "good faith" publishing or publication without malice. See; e.g., Curtis Publishing Co. v. Butts, 338 N.S. 130 (1967); Carson v. Allied News Co., 529 F. 2d 206, 213 (7th Cir. 1976). Instead, the courts have looked to the particular facts brought forward by the public official plaintiff to determine whether a jury could find "actual malice" in the Time's sense from these facts. Exactly what type of evidence is demonstrative of actual malice is, as has been said previously, a matter of interpretation based upon each individual case. However, at this point in the development of public official defamation law, numerous cases have evolved which are illustrative of proof sufficient to permit the defamed plaintiff to proceed to trial. Those cases, as well as the basis upon which these courts found that the plaintiff had met his burden of proof for purposes of summary judgment, are set out below in capsulized form:

Capsulization of Indicia
Showing "Actual Malice"

St. Amant v. Thompson, 390 U.S. 727 (1968), citing with approval Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (Warren, C. J., concurring opinion).

1. Story is fabricated by writer.

2. Story is product of writer's imagination.

3. Story based wholly on unverified anonymous telephone call.

4. Story is so inherently improbable that only a reckless man would put it into circulation.

5. Obvious reasons to doubt veracity of informant or accuracy of his reports.

Time, Inc. v. McLaney, 406 F.2d 565 (2d Cir. 1969).

6. Actual knowledge or suspicion as to falsity of statements.

7. Evidence that writer had before him contra-indications as to correctness of his conclusions.

Ragano v. Time, Inc., 302 F. Supp. 1005 (M.D. Fla. 1969).

8. Evidence of deletions of known facts and substitution of opinion while representing those statements as facts.

9. Evidence of writer's state of mind as to subject of article.

10. Author's conclusion of guilt by association stated as fact without providing reader with underlying facts upon which author reached his conclusion.

Goldwater v. Ginzburg, 414 F.2d 324 (5th Cir. 1969).

11. Use of preliminary drafts (galley proofs) to show malice, i.e., what was published as opposed to what was omitted.

12. Preconceived ideas of author about the subject matter of article and reckless treatment of facts to substantiate those preconceived ideas.

Goldwater v. Ginzburg, con't.

13. Drawing conclusions without aid of expert in area that only expert could accurately make such conclusion, and stating such conclusions to be proven facts.

14. Writer attributes statements to persons, but unable to remember person or otherwise substantiate statements upon deposition.

Carson v. Allied News Comp., 529 F.2d 206 (7th Cir. 1976).

15. Whether or not substance of article was "hot news."

16. Obviously, defamatory "fact" published without verification or substantiation.

With these guidelines as precedent, Petitioner presented the same type of proof in the present case in order to offer "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts" and some evidence upon which a jury could find actual malice or reckless disregard. New York Times v. Sullivan, Supra.

Numerous examples of such proof could be placed before this court based upon the nearly fifty (50) affidavits submitted by the defendant - authors alleged sources who deny ever having made statements to the author from which he could have reached the defamatory conclusions he published in the Harper's article as fact; who state that the defendant - author misstated valuable information which they gave him and twisted other innocuous information into defamations; and who state that the defendant - author attempted to "put words in their mouth" and get them to say something bad about the Petitioner - plaintiff. However, for purposes of this Petition, a few such examples will suffice to demonstrate that Petitioner had met his burden of proof at the summary judgment level.

Respondent - Crile, the author of the publication at issue, wrote the following of Petitioner - Fadell:

> There are two kinds assessments for corporations: real estate, which includes valuations for buildings and land, and business personal property, which includes the value of machinery and inventories. The paper's real estate assessment was $42,000 for the land. The value placed by the assessor on the building - a several million-dollar-ten-year-old structure with more than seven miles of pipes and 770 tons of steel sections covering 103,870 square feet-was $3,700. Even the far smaller and obsolete Hammond Times building in the neighboring township had a $150,000 real estate assessment. With a little digging I found that the history of my paper's assessment presented a disturbing implication.
>
> Under the previous owners and into the first years of the Ridders' ownership, the building's assessment was set at $500 and land's at $3,000. This was from 1962 to 1969.

Crile used this example to show the gross impropriety of Petitioner's assessment practices, and also to support his factual assertion that in order to get such a low assessment, the Post - Tribune newspaper and Petitioner had reached improper "business agreement." In their memorandum in support of motion for summary judgment, Respondents admit that this passage from the article was false. Indeed, that statement of purported fact was entirely false. Crile, the investigative reporter, was using assessment figures for a parking - lot shed on an almost totally unimproved and undeveloped piece of property--he had the wrong building, the wrong piece of land, and the wrong owner of the property. To show that this defamatory statement was not only false but was also published with "actual malice," Petitioner submitted the following proof:

(a) The deposition testimony of Walter McCarthy, who was then comptroller of the Post Tribune, and who testified that when Crile told him of the low assessment figures he had found for the Post-Tribune building, he informed Crile that he had the wrong property. (McCarthy dep. p. 6);

(b) McCarthy also testified that he warned Crile that tax assessments of the Post-Tribune were "too complex and could not be properly explained to the reading public." This was admitted by Crile. (Crile Answ. to Interrog. No. 166).

(c) The deposition testimony of James Rasmussen, who was then the Editor of the Post Tribune and who was working closely with Crile, who stated under oath that he felt Crile knew prior to publication that his assessment figures of the Post Tribune were wrong. (Rasmussen dep. p. 38).

(d) The deposition testimony of Walter Ridder, owner of the Post Tribune, who testified that he had told Crile that the Post Tribune building was only leased and not owned by Ridder Publications. (Ridder dep. p. 23, 25). Yet Crile used assessment records based upon ownership of the property.

In light of such evidence by identified, responsible persons who testified that author - Crile knew that his "facts" were false, yet published them anyway, it is difficult to find more conclusive proof of publication with actual malice, i.e., with knowledge of falsity or with reckless disregard for whether the statements are true or not. Moreover, such conduct is also indicative of actual malice based on Goldwater v. Ginzburg, supra, 414 F.2d at 331-32, which held actual malice exists where "the conclusions in the published article were never evaluated by any expert in the field....." This proof was disregarded by the lower courts.

At page 106 of the Harper's article, Crile wrote the following defamatory statements to again show purposeful and improper assessment practices on the part of the Petitioner:

> "For example, valuations of seven properties of the privately owned water company in Gary were reduced from $257,765 to $37,690 in one year. This meant a reduction of about $31,000 in the company's annual tax bill. Over a ten-year period this would amount to more than a $300,000 tax reduction."

To offer some proof of actual malice, Petitioner submitted the following to the courts below:

> (a) The affidavit of Leo Louis, President of utility company referred to in the passage, who stated under oath that "the records of Gary-Hobart Water Corp. do not reflect a reduction from $257,765 to $37,690 in the assessed valuation of any seven of its properties (or any of its properties) in Gary, Indiana, in any year." (Plaintiff summary judgment exh. No. 24).

> (b) The assessment figures found in the Lake County Autitors office for the years referred to in the above passage which showed an actual increase in assessments. (Plaintiff summary judgment exh. no. 120).

> (c) The applicable Indiana Statutes (Burns Ann. Stat. 364-1802 et.seq.) showing that the State Tax Board is responsible for assessing the distributable property of a public utility in Indiana and certifying that final assessment to the county auditor. This shows also that Petitioner could not have even done the act of which he was accused by Crile.

Respondent - Crile, in answer to this proof, stated that he may have been ignorant of the "special system" used to assess utilities in Indiana. He also states that he relied on some general comments made by a Mr. Joseph Geeslen, a past chairman of the State Board of Tax Commissioners, who stated that while he occupied that position, "he had learned of situations where utilities had to have their assessments substantially increased by the State Tax Board." (Defendants summary judgment memo, p. 49). Based upon Crile's ignorance of assessing utilities and an innocuous statement by Mr. Geeslen, then, Crile recklessly published this defamatory statement about Petition and represented it to be "fact" to the reading public. From such proof a jury could certainly have found "actual malice." Additionally, the twisting of innocuous information (Goldwater v. Ginzburg, supra; Carson v. Allied News Co., supra) and again, the failure to get expert opinion in an area of reporting which demanded it (Goldwater v. Ginzburg, supra; Curtis Publishing Co. v. Butts, supra) are both indicative of actual malice. At the very least, Petitioner has presented numerous examples of erroneous facts and gross misstatements published by Respondents Crile and Harpers. This, too, is some evidence from which a jury could find "actual malice;"

> As already stated, supra, Times does not hold that evidence of negligence is inadmissable; it only holds that evidence which merely establishes negligence in failing to discover misstatements, without more, is constitutionally insufficient to support the finding of recklessness required to establish actual malice from proof of less than prudent conduct. Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact,

certainly a situation not intended by the Supreme Court. See St. Amant v. Thompson, supra, 390 U.S. at 732-733, 88 S. Ct. 1323.

Goldwater v. Ginzburg, 414 F.2d 324, 343 (1969).

(3)

Crile wrote, on page 109 of the Harpers article, the following defamatory statement:

> .....my investigation (of U.S. Steel) posed two challenges: to find out by just how much the plant was underassessed and to establish conclusively who was responsible for the tax break."

Later in the article, Crile concluded that it was Petitioner who had been improperly assessing U. S. Steel and who was intentionally giving it tax breaks. To offer proof of "actual malice," Petitioner submitted the following to the courts below:

(a) The affidavit of William Shery, whom Crile represented to be one of his sources of information and who was then the neighboring Portage Township Assessor, wherein Mr. Shery states that he did not say a number of the things which Crile attributed to him; did not say Petitioner had the duty or ability to raise the assessment of U. S. Steel in Gary, Indiana; and did not draw an analogy between what he had done in another township and what Petitioner should or should not do in Calumet Township.

Moreover, Mr. Shery also stated under oath in his affidavit the following:

> "It is my judgment that Crile tried to put words into my mouth during the interview, and tried very hard to get me to say something adverse about Tom Fadell, the Calumet Township Assessor. (Plaintiffs summary judgment exh. 27).

(b) Respondent - Crile's own tape-recorded interview with John Pers, the North Township Assessor, which established that Crile knew the local assessors were not responsible for assessing the steel mills because the State Board of Tax Commissioners had taken over that responsibility. In fact, that tape recording conclusively shows Crile's knowledge of the falsehood he was publishing:

Crile: Well, I don't want to be repetitious or anything, but I think what you're saying is that a local assessor in this particular juncture in the last two or three years has not had responsibility for assessing the---if you were to look at it in fact---for assessing the steel mills.

Pers: They had responsibility for initiating assessment, but they were superceded by the State, who wanted to assume the authority throughout the whole state of making personal property assessments.

Crile: You mean, no personal property assessments?

Pers: Well, hell, your paper wrote this up many times.

Crile: Well, --

Pers: Don't you read your paper?

(Plaintiffs summary judgment p. 112-13).

(c) The affidavit of Gunner Fog, then superintendent of Union Carbides Gary Plant and another purported source of Criles, who stated that he never made the statements attributed to him by Crile and represented in the Harper's article as quotations from him.

(d) The text of the statement Petitioner made before Senator Muskie's subcommittee hearings on assessments, which shows first, that contrary to what Crile wrote in his article when he said that the subcommittee had not, in fact, met yet, the subcommittee had met nearly four (4) months prior to publication. Second, it showed that Crile was aware of the fact that local assessors, such as Petitioner, have no part in the assessment of U. S. Steel or other mills in Indiana; the State Tax Board makes in independent assessment. Crile admits to being present at these subcommittee hearings.

(e) The text of a newspaper article written by Leigh Plummer in August, 1966, which Crile stated to the courts below that he relied on to reach his conclusions that Petitioner was responsible for improperly giving tax breaks to U. S. Steel, but, which, in fact, placed the blame, if any was to be placed at all, on the State Tax Board and the Governor of Indiana (Plaintiff summary judgment exh. No. 25).

By offering proof that author Crile disregarded known facts about the assessment of steel mills; knew the final assessment had been made by the State Tax Board for the past ten years; knew that his own source, Leigh Plummer, put the blame squarely on the State Tax Board and the Governor; knew that Petitioner had stated these facts to the Muskie subcommittee hearing; and knew that Petitioner had actually helped increase taxes of the mills by millions of dollars, Petitioner met his burden of proof at the summary stage of this litigation and was entitled to allow the jury to consider whether Crile's publication of alleged "facts" contrary to this knowledge was done knowing his article to be false or in reckless disregard to whether it was false or not. Again, however, the lower courts disregarded this proof.

Numerous other glaring examples of publication with actual malice were raised to the courts below along with proof to show Crile's recklessness and/or knowledge of falsity. For example, Crile wrote on page 103 of the Harper's article that Petitioner had destroyed all the township's tax assessment records in 1967 by burying them in the Gary City dump. Of course, such a factual assertion was false, even ludicrous. But the question for purposes of this case was whether the publication of such a "fact" was reckless disregard for the truth? Crile never went to the dump to verify this statement, nor did he or any one else check the Assessor's records to learn that all personal property returns (assessment records) were still on file and personally signed by each individual taxpayer. This defamatory "fact" could easily have been checked, but Crile chose not to do so. Now, however, he seeks first amendment protection from liability claiming he had the right to rely on hearsay told to him by others, and the right to print that as fact. Petitioner submits that this is not the law, as shown by this court's holding in Curtis Publishing Co. v. Butts, supra;

> "The evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless ignored. The Saturday Evening Post knew that Burnett had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication. John Carmichael who was supposed to have been with Burnett when the phone call was overheard was not interviewed. No attempt was made to screen the films of the game to see if Burnett's information was accurate, and no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information.

> "The Post writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the sport. At trial such experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from game films regularly exchanged or valueless. Those assisting the Post writer in his investigation were already deeply involved in another libel action, based on a different article, brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation.

Butts, supra, 388 U.S. at 157-58.

It should be noted, too, that when author - Crile wrote this same story in his series for the Post Tribune Newspaper (a series never published because the attorneys for the Post Tribune determined it was unsubstantiated), the attorneys reviewing this charge of public records being destroyed wrote in the margin "Tapes (of Crile's sources) do not support the article after careful analysis." (Plaintiff summary judgment exh. No. 114).

Petitioner also submitted some proof of author - Crile's state of mind toward the subject of his defamatory article. For example, a letter from Walter Ridder to Crile while he was employed by the Post Tribune chastized Crile for having the general reputation of "being out to get Fadell," the Petitioner. (Plaintiff summary judgment exh. No. 18). In one tape recorded conversation between Crile and Phillip McFarren, a member of U. S. Steel's tax division, Mr. McFarren had explained to Crile that Petitioner was not responsible for any alleged shortage in school revenue and that the total valuation certified for the City of Gary budget was done by the Lake County Auditor, and not Petitioner as assessor. (Plaintiff summary judgment exh. No. 47). However, the tape recording then shows Crile asking McFarren; "What conceivably could his role be if one were to think the worst?" (Plaintiff summary judgment exh. No. 144).

The hypothetical answer given in response to this question, i.e., that a phony assessment figure could be passed on to the County Auditor by the Assessor, was the basis for the defamations published by Crile as fact in the Harper's article. (Plaintiff summary judgment exh. No. 39). Additionally, Crile himself even characterized his work as "digging up some dirt on Fadell." This was Crile's own words as written in an earlier version of the Harper's article, but changed by Harper's editors to "investigate" Fadell. Despite the change of wording, this still is proof showing that Respondent - Crile went beyond mere neutral reporting of stories coming to his attention. Instead, he purposefully launched a personal attack on a public official, and is deserving of no constitutional protection:

> ".....(A) publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on the privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusations. See Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U. S. 1049, 90 S. Ct. 701, 24 L. Ed. 2d 695 (1970).

Edwards v. National Audubon Society, Inc.; 556 F.2d 113 (2d Cir. 1977). The above cited holding is particularly applicable in the present case where author - Crile used secondary sources, hearsay, undocumented reports, and similar sources to support his article, yet nowhere stated in the Harper's article that what he was writing was his opinion or the opinions of others based on such secondary sources. Instead, he depicted the entire article as based on documented "facts" personally known to him to be true and substantiated. Such conduct, unquestionably constitutes "actual malice."

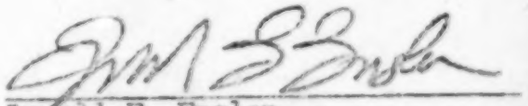
CONCLUSION

This Court's justified demand for brevity and conciseness in Petitions such as this makes it impossible to go through each offer of proof made by Petitioner below in order to bring forth some evidence upon which a jury could find "actual malice." Petitioner spent approximately two hundred and thirty (230) pages and three volumes of exhibits developing and offering this proof to the district court below. The same quantity and quality of proof was presented as to each of the twenty-two (22) specific libelous points to which Petitioner addressed himself as has been exemplified above. Yet despite such a showing, the courts below disregarded this proof or accepted instead the Respondent's protestations of "good faith reporting" and belief in the truth of what he was publishing. The haunting question left for Petitioner and this court to answer in light of the lower court's decisions is whether a cause of action even exists at all anymore for a public official who has been defamed by an author - publisher, or have decisions such as the ones here at issue so emasculated this court's initial holding in New York Times v. Sullivan that it is no longer possible for a public official to ever prevail in a defamation action?

Petitioner respectfully prays that this Court will answer this question, as well as the questions raised in this Petition and in the Issues Presented for Review, by issuing a Writ of Certiorari to the Seventh Circuit Court of Appeals herein. These questions are issues much too important to allow the circuit courts to proceed in this area of constitutional law without guidance and a definitive statement from the Supreme Court. This Court recently held in Time, Inc. v. Firestone, ____ U.S. ____, 96 S Ct. 958, ___ L. Ed. 2d ____ (1976), that the Court's expansion of the original decision in New York Times v. Sullivan has gone too far. Just as

this was true of public figure defamation actions, a review of this case will disclose that the restrictive doctrine of Time's has also been expanded too far in a public official defamation case. Petitioner prays that this Court will permit such a review.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

No. 77-393

THOMAS R. PADELL, PETITIONER

-vs-

MINNEAPOLIS STAR AND TRIBUNE COMPANY, INC., GEORGE CRILE, ANNE CRILE, JOHN COWLES, JR., RUSSELL BARNARD AND ROBERT SHNAYERSON, RESPONDENTS

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
ARGUED June 2, 1977
June 16, 1977

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon PHILIP W. TONE, Circuit Judge

THOMAS R. FADELL, Plaintiff-Appellant,	)	Appeal from
No. 77-1126 vs.	)	the United
MINNEAPOLIS STAR AND	)	States District
TRIBUNE COMPANY, INC.,	)	Court for the
GEORGE CRILE, ANNE CRILE,	)	Northern
JOHN COWLES, JR , RUSSELL	)	District of
BARNARD AND ROBERT SHNAYERSON,	)	Indiana,
Defendants-Appellees	)	Hammond Division
	)	No. 72 H 311
		ALLEN SHARP, Judge

SPRECHER, Circuit Judge. We are required to review the application of the New York Times rule to an alleged defamatory publication relating to a public official.

This is an appeal from the entry of a summary judgment in favor of all of the defendants in a libel action brought by an elected public official, the tax assessor of Calumet Township, Lake County, Indiana, based upon a nine-page article published in the November, 1972, issue of Harper's Magazine entitled "A Tax Assessor Has Many Friends--The Story of Tom Fadell, his rise to power in Gary, Indiana, and why he will probably stay there."

There was no dispute that the plaintiff was a public official subject to the application of the New York Times rule that the First and Fourteenth Amendments prohibit a public official from recovering damages in a civil libel action for defamatory falsehoods relating to his official conduct unless he proves that the statements were made with actual malice -- that is, with knowledge that they were false or with reckless disregard of whether they were false or not. New York Times Co. v Sullivan, 376 U.S. 254, 279-280 (1964). New York Times requires that actual malice be shown with "convincing clarity." Id. at 285-286.

Where the New York Times rule is applicable, the Supreme Court has required that an appellate court make an independent examination of the whole record to determine whether it could constitutionally support a judgment for the plaintiff "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." Id. at 284-285.

In Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir 1976), we accepted the following test enunciated in the concurring opinion of Judge Wright in Wasserman v. Time, Inc., 424 F.2d 920, 922-923 (D.C. Cir. 1970), for applying the "convincing clarity" standard in summary judgment situations:

> Unless the court finds on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant.

In Grzelak v. Calumet Publishing Co., 543 F.2d 579, 582 (7th Cir. 1975), we added that the "question for this Court to determine on appeal is whether the pleadings and affidavits show that the material facts about which there can be no genuine issue entitle defendant to judgment as a matter of law."

Inasmuch as the pretrial record in this case is unusually voluminous, the court below was faced with a gigantic task in measuring the plaintiff's contentions of the existence of genuine issues against the pretrial affidavits, depositions and other documentary evidence. This task was fulfilled by that court with painstaking detail and scrupulous documentation in weighing each contention of the plaintiff against the whole record. The lower court's diligence, as well as that of all counsel both when in the lower court and in presenting this appeal, have enabled us to be guided through the vast record in order to fulfill our appellate function.

The plaintiff had received an advance galley proof of Harper's Magazine article from an unknown source on October 14, 1972 and two days later he notified the magazine's officials of his intention to sue for libel. On October 27, the plaintiff sent a "Notice of Libelous Publication" to Harper's Magazine, complaining of 24 allegedly libelous passages in the article. The 24 passages were incorporated in the complaint filed in the lower court on December 13, 1972. On October 11, 1974, the plaintiff filed an amended complaint again incorporating the 24 passages but adding

that "the defendants inferred in said article that plaintiff was a member of the 'Mafia' or had dealings and/or connection with the 'Mafia'...". The lower court found that "(t)hese passages plus additional statements complained of at Fadell's deposition comprise the bases for this lawsuit."

The defendants all joined in two motions for summary judgment, each supported by a memorandum, the lengthier one being 116 pages long and referring to the pretrial documentation relating to the 24 original charges and to 21 additional statements referred to in the plaintiff's deposition. Supporting the defendants motions for summary judgment were seven volumes of material containing documentary sources for each disputed statement. Volumes I through III consist of 33 sets of the author Crile's handwritten interview notes covering 1128 pages. Volume IV consists of 17 transcripts covering 418 pages of tape recorded interviews. Volume V contains 285 pages of copies of Internal Revenue documents which were given to Crile. Volume VI contains 261 pages and Volume VII 80 pages of miscellaneous documents obtained by Crile or reviewed by him during the course of preparing the disputed article. Source material was provided for all 69 persons interviewed by Crile, either in the seven volumes filed with the summary judgment motions or in the depositions of 23 witnesses covering 5,671 pages. Crile was questioned for eight days and the transcript of his deposition covers 1,443 pages. He also responded to 341 interrogatories.

The plaintiff responded to the defendants' motion for summary judgment with a 214-page memorandum in opposition to summary judgment, supported by three volumes containing 133 attachments, including about 50 affidavits and relying upon 22 alleged false and defamatory statements in the article The defendants filed a brief response to the opposition.

The lower court carefully analyzed all of the pretrial material and entered four separate orders on December 1, 1976 The first was the summary judgment order in favor of the defendants and against the plaintiff, which is the order appealed from here The second document was a memorandum opinion which was published in 425 F. Supp. 1075-1088 (N.D. Ind. 1976), and covers 14 pages in the Federal Supplement. All parties had submitted proposed findings of fact and conclusions of law to the district court, which adopted the two of those submitted by the defendants. The findings and conclusions submitted by the publisher defendants and signed by the court on December 1, 1976 consisted of 25 findings and 2 conclusions. The findings and conclusions submitted by the author defendant and signed by the court consisted of 49 findings and 10 conclusions. All of the plaintiff's contentions are considered and resolved, including the "Mafia" matter (Finding No. 47).

With the guidance of these documents and the briefs on appeal we have examined the whole record and affirm the lower court. We also adopt as our own the lower court opinion at 425 F. Supp. 1075, including the conclusion

that "a careful review . . . (of the record) reflects no actual malice whatsoever as that term is contemplated in New York Times v. Sullivan and its progeny." Id. at 1088. Summary judgment for the defendants was warranted by applying the tests we have established in Carson and Grzelak, supra.

We note finally that although the plaintiff attempts to surmount the obstacles imposed by New York Times, his major thrust continually goes to the truth or falsity of the published statements rather than to the basic problem of whether they were published with actual malice. Factual error is inevitable in free debate and must be countenanced in order to give freedom of expression "breathing space." New York Times Co. v. Sullivan, 376 U.S. 254, 271-272 (1964). A rule limiting constitutional protection to only true statements would lead to self-censorship because difficulty in proving truth would cause those voicing criticism to "steer far wider of the unlawful zone." Id. at 279.

As Chief Judge Kaufman recently said in Edwards v. National Audubon Society, Inc., ...F.2d..., (Nos. 77-1026/7, 2d Cir., decided May 25, 1977), "the interest of a public figure in the purity of his reputation cannot be allowed to obstruct that vital pulse of ideas and intelligence on which an informed and self-governing people depend."

JUDGMENT AFFIRMED.

UNITED STATES DISTRICT COURT
For the Northern District of Indiana
Hammond Division

THOMAS R FADELL, Plaintiff	)	
No. 72 H 311 vs.	)	
MINNEAPOLIS STAR AND TRIBUNE COMPANY, INC , GEORGE CRILE, ANNE CRILE, JOHN COWLES, JR., RUSSELL BARNARD and ROBERT SHNAYERSON, Defendants	)	JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged

1. That the plaintiff, Thomas Fadell, a public officer, may not recover damages against Harper's Magazine, or the Harper's defendants for the publication made without malice, that is, without knowledge of actual falsity of any statements in the Article and without reckless disregard of whether any statement in the Article was true or false.

2. Harper's Magazine and the Harper's defendants are entitled to summary judgment against the plaintiff dismissing the complaint and to a judgment against the plaintiff for the costs and disbursements of this action.

Dated at Hammond, Indiana this 1st day of December, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

THOMAS R. FADELL, Plaintiff, v.	)	
MINNEAPOLIS STAR AND TRIBUNE COMPANY, INC., GEORGE CRILE, ANNE CRILE, JOHN COWLES, JR., RUSSELL BARNARD and ROBERT SHNAYERSON, Defendants.	)	No. 72 H 311

MEMORANDUM OPINION

The defendants have all filed motions for summary judgment on the basis of the pleadings, the depositions and answers to interrogatories on file with this Court, and the documentary materials annexed as exhibits to the motions. This memorandum opinion provides the backdrop and basis for the separately entered findings of fact and conclusions of law.

PRELIMINARY STATEMENT

The plaintiff, Thomas R. Fadell, (hereinafter "Fadell"), the elected Tax Assessor of Calumet Township, Lake County, Indiana, instituted this libel action predicated upon an article in the November 1972 issue of Harper's Magazine entitled "A Tax Assessor has Many Friends." Named as defendants in the action are George Crile (hereinafter "Crile"), the author of the article; Anne Crile, the author's wife; Minneapolis Star and Tribune

Company, Inc. (hereinafter "Minneapolis"), the publisher of Harper's Magazine through its division Harper's Magazine Company; John Cowles, Jr. (hereinafter "Cowles"), the President and Chairman of the Board of Minneapolis; Russell Barnard (hereinafter "Barnard"), who held the office of Publisher at Harper's Magazine, and Robert Shnayerson (hereinafter "Shnayerson"), who was the Editor-in-chief of Harper's Magazine. Motion for summary judgment is made on behalf of Minneapolis, Cowles, Barnard and Shnayerson. Simultaneously defendant George Crile and his wife, Anne Crile, have brought on motions for summary judgment. The essence of the author's motion is to establish that on the record in this case there is no basis on which this Court can find that any statements in the article of and concerning the plaintiff were written and published by the author with knowledge of falsity or in reckless disregard of the truth, i.e., with "actual malice", within the meaning of applicable law. In support of Crile's motion eight volumes of documentary exhibits which contain the materials upon which he relied in preparing the articles have been submitted.

Thus, the Harper defendants have adopted in all respects the memorandum and exhibits submitted on behalf of the author Crile.

STATEMENTS OF FACTS

Nelson Aldrich (hereinafter "Aldrich"), who is not a named defendant, was an Associate Editor of Harper's Magazine and the member of the editorial staff who had direct and principal

responsibility for the publication of the article.

George Crile, the author of the article in question, began his work on this article when he was a reporter for the Post-Tribune in Gary, Indiana in 1970 and 1971.

Prior to joining the Post-Tribune, Mr. Crile had done investigative work for Drew Pearson and Jack Anderson. Mr. Crile holds a bachelor of arts degree from Trinity College, where he majored in history. His undergraduate education included one and one half years at Georgetown University's School of Foreign Service. Mr. Crile also served in the Marines including a period of study at the Defense Language Institute in Monterey, California. Upon completion of his miltary obligations, Mr. Crile sought employment at the Post-Tribune and was hired by the paper's publisher, Walter Ridder.

Crile joined the reporting staff of the Post-Tribune in March, 1970. During his first months on the paper, he covered a variety of stories, many of which were personally assigned and edited by the paper's publisher, Walter Ridder. Ridder found Crile to be a "very good reporter, (an) excellent one." Some of Crile's early stories related to political corruption and maladministration in city and county government. In 1971 Ridder offered Crile a promotion to the Ridder Newspapers' Washington bureau as its Pentagon correspondent. Crile held that position until he left Ridder Publications in January 1972. Mr. Crile's work at the Post-Tribune led to a number of journalistic awards, including the United Press International

Indiana Newspaper Editors Award for 1971. Subsequent to his leaving Ridder Publications, Crile submitted to Harper's a draft of the article which became the subject of this litigation; in addition, he continued research on a book he was writing and was asked by the Fund or Investigative Journalism to evaluate a proposal to investigate presidential campaign contributions. He has been employed by Harper's since 1974 and is presently Washington Editor.

Aldrich first met Crile, then a free lance journalist, in early March of 1972. He had been asked to see Crile by a fellow journalist, Steve Schlesinger, who told him that Crile had a series he was trying to get published (Aldrich, p. 18).[1]

At their first meeting Crile brought with him a text of a "nine part" series[2] which he told Aldrich had been written when he was a reporter for the Gary, Indiana Post-Tribune (Id. at p. 19). Crile told Aldrich of his work on the Gary Post-Tribune as an investigative reporter and his special relationship with Walter Ridder, the

1. Deposition of Nelson Aldrich, hereinafter defined to as "Aldrich".

2. As indicated in the Aldrich deposition, there was some uncertainty in Aldrich's mind whether the series was in 6 or 9 parts. However, it was most ofter referred to in that deposition as a "nine part series."

Publisher of that newspaper (Id. at pp. 20, 29-30). He told Aldrich that the series had not been published by the Post-Tribune and of the circumstances of the termination of his employment at the Post-Tribune after he had been promoted by Ridder to the Post-Tribune Washington Bureau (Id. at pp. 20-21). Aldrich learned about the kind of stories Crile had covered in Gary. "What he had published in the Post-Tribune was very serious articles, which were not chasing fires." (Id. at p. 35)

Crile told Aldrich the "the gist of the story" contained in the "nine part" series (Id. at p. 38) and "in a general way how he collected the information he did with respect to Mr. Fadell." (Id. at p. 722)

At the time of this first meeting Crile was not trying to sell the series to Harper's" . . . the purpose of the meeting was for me to help him get the series published . . ." (Id. at p. 39). However, after hearing Crile's story and getting a favorable impression of his character and ability Aldrich told Crile that Harper's might be interested in the story, although there was no way in which Harper's could publish a nine part series (Id. at p. 46).

After this meeting Aldrich read the "nine part" series which was devoted exclusively to the activities of the tax assessor of Gary. (Id. at pp. 39, 69). He was very impressed with it "both as to its value, potential value as a magazine article and its inherent value as a series for a newspaper." (Id. at p. 69)

Aldrich testified that "the story he had to tell in the nine part series. . .(was) not exactly surprising to anyone who knew anything about Gary, which I happened to know. . ." (Id. at p. 40)

Aldrich, in the course of his fifteen year post-college caree, primarily in journalism (Id. at pp. 5-15), had been editor of Trans-Action Magazine, which was

> "devoted to social problems, sociologically treated--and Gary, for a number of reasons has been a subject of interest to sociologists, urban planners, and so forth, for quite a lone time, and so in the course of my working at Trans-Action I had read a goodly number of articles of various kinds on that city. There there was a piece in Harper's Magazine, I think about 4 years ago, on Gary . . . I know the photographer who took that picture (a picture which appeared in that article) and he had spent some time in Gary and I talked to him about it." (Id. at p. 43).

Aldrich's career had given him a broad background in political and social affairs; also he had been an American history and literature major at Harvard (Id. at p. 14).

After having read the series Aldrich arranged another meeting at which time he interrogated Crile respecting the material upon which the series was based [3] and discussed how a magazine article might be constructed out of the series. In the months that followed there was continuous discussions between Crile and Aldrich, in which Aldrich questioned Crile and they discussed the material. Crile told

Aldrich about his documentation. (Id. at p. 295).

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3. The Crile brief and the exhibits demonstrate the nature of Crile's research, its scope and depth. Crile had studied numerous publish articles on the subject of tax assessment and politics in Indiana and in Gary, including earlier Post-Tribune exposures of abuses in the city tax assessor's office, of the Chacharis political machine and political hiring in Gary at election time. Crile had examined published materials respecting the assessment of the U.S. Steel plant in Gary. He had examined the report of the Northwest Indiana Crime Commission on corruption in Lake County, and the study of the Lawyers Commission for Civil Rights Under Law of the Indiana property tax system.

He had interviewed a large number of public officials, leading citizens and experts with respect to tax assessments in Gary,political conditions in Gary and election events in Gary. Crile had been initially assisted in his investigation of Gary tax assessment by Wilbur Saleb, who had worked for both the Internal Revenue Service and the Gary Tax Assessor's Office, and was familiar with the working and practices of the Assessor's office.

Crile had studied the public records, both with respect to payrolls and with respect to tax assessments. He had examined the assessment records of a number of companies over a period of years,

3. (continued)
tracing the history of Fadell's assessments of those companies and comparing Fadell's assessments with those of the State Board of Tax Assessors. Crile had interviewed businessmen, lawyers and journalists familiar with the subject and who had experienced what went on in Gary and in the Assessor's office. He had obtained statements (some in writing, some on tape) from former employees in the Assessor's office, from former Fadell campaign workers who were on the public payroll, from business men and lawyers who had dealt with Fadell and his agents.

Crile had obtained the assistance of Oral Cole, a former IRS official who had worked in IRS investigations of Fadell. Cole gave Crile information about the IRS investigations of Fadell, and made IRS documents relating to Fadell available to Crile. Crile was also given access to Grand Jury materials.

Between the second meeting and April 24, when Crile and Aldrich met again, Crile worked on putting the material in magazine form (Id. at p. 57-58). After the meeting of April 24 Crile returned to Washington and continued writing (Id. at p. 59-60). In early May Crile submitted an article about 60 pages long (Id. at p. 58) which Aldrich read and reread, trying to find an appropriate structure. During these months of writing and rewriting Aldrich made structural suggestions; he suggested inclusion of the them (sic) of Crile's

relationship to Ridder and the theme of the election campaign between Dr. Williams and Mayor Hatcher (Id. at page 70). The Post-Tribune assessment material which appears in the Harper's article grew out of the Ridder theme (Id. at pp. 72-73). Aldrich and Crile had many meetings and telephone conversations throughout this period.

Crile cut the 60 page manuscript and sent the cut version to Aldrich, who worked on it over the July 4 weekend (Id. at 69-60). (sic)

Aldrich had formed a favorable impression of Crile at their first meeting. (Id. at 279). Aldrich stated that the first meeting was primarily concerned with establishing "what kind of guy he was. This has a direct bearing on whether the story was true or not" (Id. at p. 279). After the first meeting with Crile, Aldrich spoke to Steve Schlesinger about him. Schlesinger told Aldrich that Crile was a man of integrity and common sense (Id. pp. 120-121). Aldrich also spoke about Crile with Jules Pfeiffer who said that Crile was an intelligent man, a man of character (Id. pp. 121-122) and with Richard Elman, who knew Crile well and had a high regard for his work (Id. at p. 124). Aldrich had learned that Crile was the step son-in-law of the columnist, Joseph Alsop, and the son-in-law of Susan Alsop, who was an old friend of Aldrich's. Aldrich recalled Susan Alsop's having told him (before he met Crile) how well Crile was doing in his newspaper career (Id. pp. 117-120, 869). Marietta Tree (a former United States official at the United Nations and friend of Aldrich) also spoke well of Crile to Aldrich (Id. at pp. 117-120).

Aldrich introduced Crile to a literary agent, Goerge Obst, (sic) and they discussed Crile's talent (Id. at p. 123).

On the basis of his review of the material, his meetings and discussion with Crile, his knowledge of Crile's background and credentials, and his own background and experience, Aldrich came to have "every confidence in Mr. Crile" (Id. at p. 115). His work with Crile led him to "very much doubt" that Crile would make a mistake in judgment (Id. at p. 226). If he had made a mistake it would have been an honest mistake (Id. at p. 499). Aldrich had confidence in Crile's credibility and believed that Crile had a high degree of accuracy and competence (Id. at pp. 315, 318, 319).

Aldrich did not believe that Crile had any "ill will or spite" against Fadell -- "quite the contrary" (Id. at p. 234). (See also Id. at pp. 541, 543, 544). Nor did he believe Crile "had an axe to grind" respecting Walter Ridder. . . "Not at all. This was surprising to me. I would like to put on the record. . . I would have expected that and I probed for that." (Id. at pp. 234, 237). Aldrich testified that he "had evern (sic) reason to believe that Crile's desire for accuracy and fairness was real" (Id. at p. 240); he had (sic) "ascertained to my own satisfaction that his character was good and his journalist skills were adequate for this job and I relied thereon" (Id. at p. 242). Aldrich arrived at his judgment "by talking to him, as I did at great length and by examining the product" (Id. at p. 244).

Aldrich was constantly concerned "for the truth of the material" (Id. at p. 277). "The most serious point in determining whether we should publish the article was its accuracy" (Id. at p. 278).

Repeatedly Aldrich made clear that ". . . my whole attitude toward the article was questioning, getting it right" (Id.at p. 796). Thus, for example, he testified:

> ". . .I questioned Mr. Crile at every opportunity with respect to where he got his information, what that information was, and I also queried at the outset his character and motives, if you will, and then was very careful to see that the article was inherently consistent and logical . . ." (Id. at p. 795)

Similarly, he testified:

> " . . . throughout our relationship over this article, and insofar as we were concerned about that (accuracy) I would ask him, in effect, 'Well what is the background of that particular part of the story?'
>
> "And he would say, 'Well, this and such happened.'
>
> 'I spoke to so and so. I got this information in such and such a way'." (Id. at p. 273)

Aldrich described the process at pp. 310, 311 of his deposition:

"Let us take it concretely. The author, Crile, makes a statement. I would say -- I would not begin necessarily with the presumption of that statement's accuracy. I would say 'How do you know that" Can you back it up? . . .' And he would say, 'Yes, I can with such and such a document or the testimony of such and such a concern'.

With respect to the specific items in the article, for example the Post-Tribune assessment material, Aldrich Testified: "I recall asking him about that particular story or comment or allegation in his article as I did about most of the others, how he knew what he said." (Id. at pp. 76-77); "I think I queried the point as I queried all of them. I said -- I asked him what documentation or proof he had of that, and he told me . . . I recall he told me that he had gone out to Gary, Indiana, and assessed the truth of that allegation. . . I was satisfied that he had documentation" (Id. at p. 78; See also Id. at pp. 232, 811-812).

With respect to the incident of Crile being driven off the road, "we went over this incident very carefully" (Id. at p. 158).

With respect to the diversion of public funds to Fadell's political or personal use: "I did what I did about all points in this article, I queried him about what evidence he had to make this assertion and he told me he had the testimony of people" (Id. at p. 185).

The Aldrich deposition established that Aldrich elicited the facts supporting the article

from Crile during these monts of pre-publication review. Thus, Crile told Aldrich about the Muskie Sub-Committee hearing, Fadell's testimony there and showed Aldrich Jack Anderson's reports on this (Id. at pp. 354, 359); Crile advised Aldrich of the Nader activities and the Chicago Businessmen's Committee activities (Id. at p. 357); Crile told Aldrich about the grand jury investigation of Fadell (Id. at pp. 357, 440); Crile told Aldrich he had IRS documents obtained from Oral Cole (Id. at pp. 409-410) and about his access to grand jury material (Id. at p. 455); Crile told Aldrich about the businessman threatened by Fadell whose assessment was increased because is refused to back Fadell and gave him the businessman's name (Id. at p. 411); Crile told Aldrich of the Dun & Bradstreet reports on Fadell (Id. at 425); Crile gave Aldrich the background for the story of Fadell's conduct before the grand jury (Id. at pp. 451-452); Crile gave Aldrich details respecting Fadell's relatives on the public payroll (Id. at p. 565); Crile gave Aldrich details respecting persons on the public payroll who did private work for Fadell (Id. at pp. 573, 575-577); Crile told Aldrich that he got the facts as to hiring campaign workers on the basis of signed statements of campaign workers (Id. at pp. 591, 616) and the assessor's payroll record (Id. at p. 617); and Crile told Aldrich that he had statements from people who were directly involved in these matters (Id. at pp. 687,693). Aldrich testified that Crile probably gave him the names of "corporate conduits" (Id. pp. 751-752)and that they had talked about various of Fadell's business

interest (Id. at p. 760); Crile told Aldrich of his examination of public documents in the auditor's office (Id. at p. 825); and Crile told Aldrich of the economist who had studied the U. S. Steel assessment . . . "He was in some neighboring university, I have forgotten his name" (Id. at p. 853). Crile told Aldrich he had seen the tax assessment records for the Post Tribune (Id. at pp. 76-78.

On the basis of his work with Crile, Aldrich was convinced that the article was true and accurate (Aldrich passim, e.g. pp. 411, 421-422, 434-435, 455, 460, 461, 468, 515, 651, 679, 789, 891-892).

Aldrich was thus made fully aware by Crile of the kind of documentation Crile had obtained to back up the statements in the article, but Aldrich did not himself examine the documentation. He expected such examination - to the extent appropriate - to be conducted by counsel. (Id. passim).

After these months of work by Crile and Aldrich, culminating in Aldrich's editing over the July 4, weekend, the manuscript went to the other Editors of Harper's and to Robert Shnayerson, the Editor-in-chief (Id. at pp. 74 -75; Shnayerson deposition at p. 8).[4]

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4 Hereinafter referred to as "Shnayerson".

Shnayerson, as Editor-in-chief of Harper's was in overall charge of the editorial aspects of the magazine (Shnayerson at p. 18). Shnayerson had years of experience in reporting, including working as a reporter for the New York Daily News, as a reporter for Life Magazine a correspondent and bureau chief for Time-Life News Service, as a contributing editor for Time Magazine, as the editor of the Education Section of Time for five years, of Times Law Section for three years, and senior editor of the Essay Section at Time Magazine (Id. at pp.10-15).

Shnayerson was responsible for Harper's efforts toward being a "responsible publication .....with some influence" (Id.at p. 22). Harper's editorial policy was to seek accuracy and fairness in matters that it published (Id. at p. 25). To effectuate this policy his subordiantes had been directed to

> "make every effort to make sure that writers had documented their articles; that they have some record, either written or on tape, backing up statements that may be questionable, that they bring up all controversial points with our counsel who is retained by us on a regular basis; that they be alert to anything that might be questionable" (Id., p. 26).

Harper's does not have a research staff "as does Time" (Id. at p. 32). It, therefore, had to rely principally on the writer, the writer's representations and on Harper's judgment of him (Id. at p. 32).

With respect to this article, since it was an article based upon the author's personal experience, Shnayerson considered the author's personal credibility very important (Id. at p. 108). Shnayerson had personally met Crile prior to publication of the article. This occurred shortly after Shnayerson had read the manuscript (Id. at p. 140). Shnayerson discussed Crile's background and interest in journalism in order to evaluate Crile. Shnayerson was interested in Crile's bearing, his manner of conversation, whether he spoke in forthright manner and whether he appeared to be a stable individual (Id. at p. 147).

As a result of the reading of the manuscript, Aldrich's judgment of Crile and his own personal meeting with Crile, Shnayerson concluded that Crile was a "very sound, strong and straight young man" (Id. at p. 251), whose character was good (Id. at pp. 145, 161, 251).

In addition to Aldrich and Shnayerson, other editors at Harper's read the article and approved it (Aldrich, pp. 74-75). Shnayerson stated that the reason the article was published by Harper's was because it was:

> "a matter of great public interest; it was a fascinating article; it was a rare example of journalism which casts light on a political process, the nature of power in American communities. It was a contribution to enlightenment on how this country works in various places, because it was a dmn good article" (Shnayerson, pp. 302, 418).

Shnayerson also noted that he found the article to be fair and accurate as far as the final version that went into press (Id. p. 361). In addition to the article being an expose article, it was also to a large extent personal memoirs (p. 419). It dealt with a young journalist's efforts to have an investigative article published in a newspaper.

By coincidence, prior to publication of the article, Cowles read a galley or page proof. Cowles does not maintain any direct supervision over the editorial content of Harper's Magazine. However, when in New York in September of 1972, at the offices of the Magazine, he asked Shnayerson what would be in the upcoming issue. Among the things mentioned was the article in question. Cowles was interested because he knew the publisher of the Gary Post-Tribune, Walter Ridder, personally. He asked for a copy of the article which he read at his hotel that evening and thereafter telephone Shnayerson with one or two minor comments relative to dates and clarity of exposition of certain figures (Cowles deposition, pp. 10-13).

Barnard, whose function as publisher of the Magazine had to do entirely with the business side of the operation did not see the article until after it was printed (Barnard deposition, pp. 173, 174).[5]

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5 Hereinafter referred to as "Barnard".

After the article had been edited and was approved by Shnayerson, Aldrich sent a copy of the manuscript to Greebaum, Wolff & Ernst, the Magazine's counsel for review. Robert Croog, Esq., an attorney associated with Greenbaum, Wolff & Ernst, read the article. Aldrich told Croog that he had worked with Crile for some time and that he was honest and trustworth (Croog deposition, p. 71).[6] Croog then arranged an interview with Crile (Croog at p. 5). Crile came to New York from Washington to Croog's office and, as Croog had requested, brought with him a quantity of documents and materials which formed the basis for statements made in the article (Id. at p. 5-8). Crile told Croog that the materials he had brought, amounting to a stack three to four inches high (Id. at p. 75) were only a portion of the documentation which he had for the statements in the article but, because he had flown to New York from Washington, he has been unable to bring the entire mass of material (Id. at p. 11).

Croog questioned Crile "at length" (Id. at pp. 21, 22). Croog went through the entire article with Crile and obtained Crile's oral statement of the basis for statements which appeared in the article. Croog reviewed a representative amount of the documents which were shown to him by Crile, substantiating statements Croog questioned (Id. at p. 23). Croog did not examine all of the materials that Crile had brough with him. Croog testified that Crile was open with respect to producing any documents Croog asked for in the

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6 Hereinafter referred to as "Croog".

process of Croog's review of the article (Id. at p. 75). He concluded that the article had been thoroughly researched and was accurate. He also concluded, as had Aldrich and Shnayerson, that Crile was honest and reliable and that the statements he made were truthful (Id. at pp. 72, 73). He told Aldrich that he was impressed with Crile and has examined documentation (Aldrich, p. 404).

The article, in final revised form, appeared in the November 1972 issue which went to the printer late in September of 1972 and was distributed to subscribers and to newsstands early in October (Barnard, p. 189).

Thereafter, this action was commenced by the plaintiff.

I

PLAINTIFF, A PUBLIC OFFICIAL, HAS THE BURDEN OF ESTABLISHING THAT HARPER'S PUBLISHED THE ARTICLE WITH "ACTUAL MALICE"

In the landmark decision of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court held that the constitutional guarantee of freedom of speech and press imposes severe restrictions on the states' libel laws when the allegedly defamatory publications relate to official conduct of an elected official. The Court held that these constitutional guarantees prohibit recovery unless the official "proves that the statement was made with 'actual malice'." Id. at 279.

Plaintiff as the elcted tax assessor of Calumet Township is indisputably a public official. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenblatt v. Baer, 383 U.S. 75 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, supra. This case falls squarely within the reason and scopy of the application of this rule.

In Rosenblatt v. Baer, supra, the Supreme Court stated:

> "The motivating force for the decision in New York Times was twofold. We expressed 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that (such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' 376 U.S. at 270 11 L ed 2d at 701, 94 ALR 2d 1412. (Emphasis supplied). There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of governmentitself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have,

> substantial responsibility for or control over the conduct of governmental affairs." Id. at 85.

In Gertz v. Robert Welch, Inc., supra, the Supreme Court, drawing a distinction between private and public defamation of plaintiffs, reiterated in part the rationale for the New York Times rule as to public officials:

> "An individual who desides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in Garrison v. Louisiana, 379 U.S. at 77, the public's interest extends to 'anything which might touch on an official's fitness for office . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.'" Id. at 323

The issues of taxes is, of course, an issue of intense public concern. How the tax assessor operates in carrying out his public trust is an area requiring the widest constitutional protection of free debate.

In order to meet the requirement of "actual malice" under the constitutional standard established by the Supreme Court in New York Times-Co. v. Sullivan and its progeny, the plaintiff must produce:

> "... clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." Gertz v. Robert Welch, Inc., supra, at 342.

The plaintiff has the burden of proving that the defendants published "with a high degree of awareness of probably falsity" (Garrison v. Louisiana supra, at 74). In St. Amant v. Thompson, 390 U.S. 727, 731 (1968) the Court stated:

> "(R)eckless conduct is not measured by whether a reasonable prudent man would have published or would have invesitgated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication . . . ."

Thus, in order to prevail in this case, the plaintiff must establish that Harper's either knew that allegedly defamatory statements in the article were false, had a high degree of awareness of their probable falsity, or entertained serious doubts as to the truth of the statements.

As is demonstrated in the memorandum submitted in support of Crile's motion for summary judgment, many of the statements complained of are not false, many do not refer to the plaintiff and, in any event, none of them was made by Crile with "actual malice."

Harper's, which relied on Crile, not only had no knowledge that any statement in the article was false; it is clear that Harper's did not entertain doubts respecting the truth of any statement, and had no awareness whatsoever of probable falsity of any part of the article.

On the Contrary, Aldrich and Croog, after examining the bases for Crile's statements in the article, were satisfied that statements were true and were convinced that Crile was a reliable and truthful reporter. They were made aware by Crile of the fact that he had extensive documentary evidence tape recordings and notes of interviews with knowledgable sources, and broad information upon which the article was based. Indeed, in retrospect, as is shown in the eight volumes of documents submitted with the Crile motion for summary judgment, as well as the extensive information provided in the interrogatories and the depositions, the reliance of Harper's on Crile was well placed.

As shown above, Aldrich questioned Crile about the bases for the statements in the article over the course of many meetings and discussions. When Croog queried Crile at length with respect to the article he was shown documents and was told of the other extensive documentary and back-up materials which Crile had. Croog relied on that, as did Aldrich and Shnayerson, as well as on their confidence in Crile's honesty and ability. That back-up material exists and existed at the time and is now before the Court.

Thus, Harper's meticulously explored with the author the background for his statements and the Editor, the Editor-in-chief and counsel all spearately concluded that the author was reliable and trustworthy.[7]

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7 There was nothing in the article which was in any way "so inherently improbable that only a reckless man would have put them into circulation (St. Amant v. Thompson, supra, at 732). This is particularly so when considered in context of the subject matter of the article and general knowledge about inquiries into Gary at that time. Cf Bostic v. True Detective Magazine Co., 363 F. Supp. 919 (S.D. N.Y. 1973). This Court can take judicial notice of stories uncovered in recent years by investigative reporting which might well not have been published if the press had not bee prepared to expose official wrongdoing in the interest of "uninhibited, robust and wide open" discussion of public officials and matters of public concern. These publishers did not self

censor themselves because of fear that some plaintiff might later allege that these revelations were "inherently improbable."

Harper's lack of "actual Malice", indeed, its belief in the accuracy of the article, is well established by the record and by the legitimacy of the sources of information it believed Crile was relying upon. See Trails West v. Wolff, 32 N.Y. 2d 207 (1973) (reliance upon Department of Transportation report held proper despite plaintiff's objections before publication); Time, Inc. v. McLaney, 406 F. 2d 565 (5th Cir.) cert. denied, 395 U.S. 922 (1969) (reliance upon employee of the Department of Justice); Cardello v. Doubleday and Company, Inc. 366 F. Supp. 92 (S.D. N.Y. 1973).

Harper's has no independant investigative staff and thus made no independent investigation of the facts. It was not required to doso.

In Beckley Newspaper Corp. v. Hanks, 389 U.S. 87 (1967), a clerk of the court had recovered a judgment where an editoral had stated that "perhaps his blustering threats were able to intimidate" the president of the County Board of Health. The alleged participants denied the alleged threat and on cross-examination the newspaper's president stated "you don't have to make an investigation" before making such charges about a well known public figure since there was cause to "feel" there was the "possibility" of a treat. The Supreme Court held that "it cannot be said on this record that any failure of petitioner to make a prior investigation constitutes proof sufficient to present a jury question . . ." Id. at 84, 85.

Similarly, in St. Amant v. Thompson, supra, the court held "Failure to investigate does not in itself establish bad faith." Id. at 733. See, also, New York Times Co. v. Sullivan, supra; Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); Dacey v. Florida Bar, Inc., 427 F. 2d 1292 (5th Cir. 1970); Alpine Construction Co. v. DeMaris, 358 F. Supp. 422 (N.D. Ill. 1973) (a statement in an article which had been retracted was relied upon yet the Court stated: "...it is apparent that while more thoroughness might be desirable and would have caught the subsequent retraction, 'failure to do so does not result in reckless conduct unless the defendant entertained serious doubts as to the truth of the publication.'" Id. at 424; Kent v. Pittsburg Press Co., 349 F. Supp. 622 (W.D. Pa. 1972)).

Even an author whose function is to gather facts need not necessarily verify his information As stated in New York Times Co. v. Connor, 365 F. 2d 567, 576 (5th Cir. 1966):

> "While verification of the facts remains an important reporting standard, a reporter, without a 'high degree of awareness of their probable falsity' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official."

In Connor the author was a staff member of the New York Times and the New York Times has a very large staff of reporters who can do investigatory work. Here Crile was an independant author and Harper had no such staff available.

Similarly, in Arizona Biochemical Company v. Hearst Corporation, 302 F. Supp. 412, 418 (S.D. N.Y. 1969), the plaintiff argued that "Metromedia's investigation was so 'slipshod and sketchy' . . . as to constitute the reckless conduct required by the Times case." The court concluded that "This misses the point. In order to satisfy the New York Times standard plaintiff must charge a doubting state of mind on the part of the defendant." See also Otepka v. New York Times Co., 379 F. Supp. 541, 544 (D. Md. 1973).

I I

ON THIS RECORD PLAINTIFF CANNOT ESTABLISH "ACTUAL MALICE" ON THE PART OF HARPER'S

Following the decision of New York Times Co. v. Sullivan, supra, it has been established that summary judgment is a singularly important factor in the protection of freedom of the press from liable suits. The "chilling effect" of a libel suit on First Amendment rights calls for a judicial attitude more favorable to a summary judgment than in ordinary case, where prevailing attitudes generally disfavor the liberal use of summary judgment dispositions. Thus, in Bon Air Hotel, Inc. v. Time, Inc., 426 F. 2d 858, 865 (5th Cir. 1970), the court noted that, where Times v. Sullivan applies, "summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutinal protection in the proper case."

It is worth pointing out that the length of the record in this case and the plethora of motions made by the plaintiff in itself demonstrates the magnitude of the "chilllng effect" which the Times v. Sullivan rule is designed to prevent. The expense of the defendants incurred in this matter over a period of, at this point, almost four years has already been of a scope which tends to have a "chilling effect" on the exercise of First Amendment rights which the rule of the Times case is intended to protect. To require the defendants to incur the further expenses of a trial in this matter, where on this record there is no proof of "actual malice" on their part, would be wholly contrary to the command of the Times v. Sullivan principle.

It is in order to prevent the "chilling effect" of such burdens on the press, and to facilitate free debate on issues of public concern that the courts have more and more taken the position that the First Amendment issues which arise out of libel suits should be disposed of on summary judgment where a public official plaintiff has failed to establish "actual malice" It is not enough for the plaintiff to allege that a defamatory falsehood has been published, or that the defendant acted carelessly.

In Washington Post Co. v. Keogh, 365 F. 2d 965, 967-968 (D.C. Cir. 1966), cert. denied 385 U.S. 1011 (1967), the court stated:

"...That state of mind should generally be a jury issue does not mean it should always be so in all contexts, especially where the issue is recklessness, which is ordinarily inferred from objective facts. Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement . . .

"In the First Amendment area, summary procedure are even more essential. For the stake herein, if harassment succeeds, is free debate. One of the purposes of the Times principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a pople public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself especilly to advocates of unpopular causes."

See also, Time, Inc. v. McLaney, supra; Cardello v. Doubleday and Company, Inc., supra.

The appropriateness of summary judgment in such cases is also apparent from the Times v. Sullivan requirement that evidence of "actual malice" be of "convincing clarity." See, United Medical Laboratories v. Columbia Broadcasting System 404 F. 2d 706, 712 (9th Cir. 1968), cert, denied, 394 U.S. 921 (1969)

Wasserman v. Time, Inc. 424 F. 2d 920, 922 (D.C. Cir.) cert. denied 398 U.S. 940 (1970).

"Actual malice" may be "presumed", but is a matter of proof by the plaintiff, New York Times v. Connor, supra; Time, Inc. v. McLaney, supra. Absent proof with "convincing clarity" summary judgment must be granted to the defendants.[8]

The Court has before it on this motion lengthy depositions of all the concerned parties and many witnesses, extensive documentary evidence contained in the eight volumes submitted in support of the Crile motion, and the answers to extensive and detailed interrogatories. There is no proof of "actual malice" on the part of Harper's. As was said in Wasserman v. Time, supra at 922:

> "Unless the Court finds, on the basis of pre-trial affidavits, depositions and other documentary evidence that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant."

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8 Reliance upon the hope that cross-examination will raise a credibility issue on malice "is simply insufficient." Goldman v. Time, Inc., 336 F. Supp. 133 (N.D. Cal. 1971).

Goldman v. Time, Inc., supra; Alpine Construction Co. v. DeMaris, supra; Kent v. Pittsburgh Press Co., supra; Meeropol v. Nizer, 381 F. Supp. 29 (S.D. N.Y. 1974); Otepka v. New York Times Co., supra.

That there may have been factual errors in the article, such as the information with respect to the Gary Post-Tribune's assessment, is immaterial. It is clear that Harper's was totally unaware of those factual errors (as indeed was Crile).

The recent case of AAFCO Heating and Air Conditioning Co. v. Northwest Publications Ind., _____Inc. App. _____, 321 N.E. 2d 580 (1974), is an apt statement of the law. The court said:

> "The publisher who maintains a standard of care designed to avoid knowing or reckless falsehood must be accorded sufficient assurance that those factual errors which nonetheless occur will not expose him to indeterminate liability. If a genuine issue of material fact concerning a publisher's reckless disregard for the truth could be raised by a mere showing that the published speech was factually incorrect, the consituttional policy of avoiding media self-censorship would be seriously eroded." Id. at 591

Plaintiff has utterly failed to raise a genuine issue of fact as to Harper's having "in fact entertained serious doubts as to the truth" of the article. St. Amant v. Thompson, supra. Indeed, it is abundantly apparent that the demonstrate that the plaintiff cannot prove

actual malice in the Time sense and, therefore, the Court should grant summary judgment for the defendants.

In Carson v. Allied News Co., 529 F. 2d 206 (7th Cir. 1976), the Seventh Circuit adopted the concurring opinion of Judge Wright in Wasserman v. Time 424 F. 2d 920, 922-23 (D.C. Cir. 1970), as a standard for deciding summary judgment motions in cases such as this. In that opinion Judge Wright stated, in a passage approved by the Seventh Circuit:

> "Unless the court finds, on the basis of pre-trial affidavits, depositions and other depositions and other documentary evidence that the plaintiff can prove actual malice in the Times sense it should grant summary judgment for the defendant."

In this case, based upon the evidence, it is abundantly clear that Fadell cannot prove actual malice "in the Times sense."

In Carson the concern was the private life of a television celebrity. Here we are concern with the public conduct of an elected public official. It is hard to find a more classical application of full blown First Amendment values as enunicated in New York Times v. Sullivan.

The last word from our Court of Appeals for this Circuit is squarely on point and is highly relevant both as to reasoning and result. See Grzelak v. Calumet Publishing Co., Inc. ____ F. 2d _____(7th Cir. 1975). In it Senior Judge Grant of this Court, speaking for that Court, said:

"The principle espoused in the landmark case of New York Times Co. v. Sullivan, supra, simply stated, is that a public official is prohibited from recovering damages for a defamatory falsehood relating to his official conduct unless he proves 'actual malice' -- that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. The concept of recklessness, as it is used to define New York Times malice, requires that the publisher act with a 'high degree of awareness of . . .probable falsity' in printing the subject matter in question. Gertz v. Robert Welch, Inc., _____ U.S. _____ 41 L. Ed. 2d 789, 94 S. Ct. 2997, 3003 (1974); Garrison v. Louisiana, 379 U.S. 64, 74 (1964). It is clear that 'mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth' Gertz, supra, 94 S. Ct. at 3003; Beckley Newspaper Corp. v. Hanks, 389 U.S. 81,84-85 (1967) Rather, the defendant must, in fact, entertain serious doubts as to the truth of the publication to be guilty of recklessness St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

"The burden of proving actual malice on the part of the defendant, which is undoutedly a very difficult and demanding burden, must be shouldered entirely by the plaintiff. Such a stringent burden results from the deep-rooted belief that 'speech concerning public affairs is more than self-expression; it is the essence of self-government."

Garrison, supra, 379 U.S. at 74-75. Indeed, this heavy burden which is placed upon plaintiffs--and which appellant must sustain in the present appeal--is designed to minimize the 'chilling effect' that libel suits invaiably have on the exercise of First Amendment rights by publishers, Time, Inc. v. McLaney, 406 F 2d 565, 566 (5th Cir. 1969), and, as counsel for appellee noted during oral argument on appeal, 'to prevent persons from being discouraged in the full and free exercise of their First Amendment rights . . .' Washington Post Company v. Keogh, 365 F. 2d 965, 968 (D.C. Cir. 1966). The initial question for this Court to determine on appeal is whether the pleadings and affidavits show that the material facts about which there can be no genuine issue entitle defendant to judgment as a matter of law.

"First of all, we find merit in, and are persuaded by appellee's contention that appellant in this case occupied a public position and that the matter of her political appointment was a subject of public or general interest. Event if it could be argued, however, that in the present circumstances appellant was not a public figure about whom considerable editorial comment would be allowed, we are not in doubt that the fact that she was a political patronage employee presents an issue about which the public at large undoubtedly has a genuine interest and concern

Rosenbloom v. Metromedia, 403 U.S. 29, 44-45 (1971). Given such circumstances then, any statement which appellee published concerning appellant must have been made with actual malice for an action in libel to prevail."

This Court has carefully reviewed a memorandum of plaintiff consisting of 234 pages together with extended volumes of 133 attachments. It would normally be assumed that in such a volume there would be some contention to prevent the entry of summary judgment. However, a careful review of these reflects no actual malice whatsoever as that term is contemplated in New York Times v. Sullivan and its progeny.

Therefore, summary judgment is now authorized and GRANTED in favor of all defendants in this case.

This case is now also removed from the trial calendar on March 14, 1977.

Enter: December 1, 1976

/s/ Allen Sharp
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX D

(Complete Text of Harper's
article without marginal notes)

A TAX ASSESSOR HAS MANY FRIENDS

The story of Tom Fadell, his rise to
power in Gary, Indiana, and why he
will probably stay there

Special Agent Oral Cole of the Internal Revenue Service's Criminal Intelligence Division read the letter I had given him. It was addressed to me.

Dear George:

...As you know, Nader is very interested in Gary from several points of view. First is the property tax situation there. Second is the fact that you mentioned about possible irregularities in the IRS regional office. I have talked to Ralph about both subjects and he is extremely interested in receiving information on both...Anything you could get us right away will be appreciated.

Samuel Simon, Associate

"Good, that's fine," Cole said in a slow country drawl. "I'm sorry to have insisted on the letter but I just don't trust the Post-Tribune." Reporters rarely get secret interviews with IRS agents, but in a manner very closely related to the "property tax situation" in Gary, Cole's life had just caved in on him, and when I explained I was in touch with Nader, he agreed to see me.

Special Agent Cole had once been at the top of his profession. A last-minute report from him to Attorney General Robert Kennedy in 1961 had put the first dent in Gary, Indiana's corrupt political machine. George Chacharis, the then mayor of Gary and an assiduous deliverer of Kennedy votes in the 1960 campaign, had been chosen to be President Kennedy's ambassador to Greece. The announcement of his nomination was never made. Cole's report showed that the Gary mayor was involved in a complex tangle of illegal activities and had failed to report on his federal income tax returns at least $260,000.00 worth of income from kickbacks on city contracts. Instead of Greece, Chacharis was sent to jail.

Cole, meanwhile, was promoted to a job in Washington where he established himself as one of IRS's best agents. In 1966 he was called back to Gary to complete an investigation of another machine politician; this time, however there were no promotions at the conclusion of his work, only personal disaster.

The object of Cole's 1966 probe was Chacharis' protege, the present tax assessor of Calumet Township, Thomas R. Fadell. "I'm the law in Calumet Township," Fadell once told a Gary businessman who was threatening to take legal action against him. The businessman had refused to bribe Fadell and the assessor had responded by tripling his company's tax assessment. "There's nothing you can do about it," he had explained matter-of-factly. And indeed there wasn't much the man could do; Fadell had become the boss of Chacharis' political machine, and the machine's influence extended to the prosecutor's office and the courts in Lake County.*

Before Cole was assigned to the case, Fadell had sought out the two IRS agents investigating him and threatened to raise the assessments on their houses if they didn't stop. When they continued, he followed through with his threat. He then wrote to the IRS regional director demanding that the investigation be halted. "The agents," he charged, "are guilty of spying, viciousness, arbitrary capriciousness and sham ... of fabricating stories in an attempt to give their idious, illegal actions an aroma of legality." This was typical language from the man who signed his letters, "From your friendly assessor."

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* The machine lost control of the Gary City Hall in 1967 when Richard G. Hatcher was elected mayor. But it retained control of the township and county offices in Lake County, and thus control of the machinery of criminal justice.

Fadell is the son of a Croatian steelworker. A Marine captain in the Korean war, he still carries himself as if he were in uniform. He was a struggling lawyer in 1958 when Chacharis took him under his wing and got him elected assessor. From this advantageous base, Fadell managed, within a few short years and on a $12,500-a-year salary, to assemble a small business empire.

As the federal grand jury began to hear evidence on the case, Special Agent Cole was confident of the outcome. Yet after hearing evidence for the better part of a year, the jury's term expired without its being asked to vote on returning an indictment. Shortly afterward Cole's local supervisors pressured him to close out the case. He refused to sign the final report and was temporarily transferred to New York. Several months later, he was recalled to Gary and charged with accepting a gift (a $35 pool table) in violation of IRS rules.

Angry and frightened, Cole fought back by requesting support from Washington. He indicated that the IRS's Indiana regional office needed to be investigated and asked for a public airing of his own case. Then Herbert J. Miller, an Assistant Attorney General under Robert Kennedy who knew Cole's work and respected his integrity, offered to defend the accused agent. The combination was too hot for Cole's supervisors. They erased the charges on his official records and dropped their case.

It was an empty victory for Cole. He was already suffering from acute arthritis and glaucoma in his only eye; the emotional strain had aggravated both of these conditions. More important perhaps, he felt numiliated and betrayed by the organization he had believed in and devoted his life to. Soon after I met with him in early 1971, he resigned

"So, you're on to Mr. Fadell," Cole said slowly after rereading the letter from Nader's associate. "You'd better be careful. He can be pretty rough." But the agent's mood seemed to change as he looked over the letter once again. "Come back next week and we'll talk some more."

I worked with Cole for the next few months, going over the ground he had already covered in his investigation of the Calumet Township tax assessor and then I went considerably further. What emerged was the story of the corruption of an entire city. In a sense, however, Oral Cole's contest with Tom Fadell only prefigured my own. The nine-part series I wrote for the Gary Post-Tribune was never published. Possibly it is locked away somewhere in the paper's offices; or perhaps it is decaying in the same Gary dump where Fadell had all the township's tax assessment records buried in 1967.

Taxing Steel.

The paper that I came to work for in the spring of 1970, the Post-Tribune, is one of fourteen dailies in the Midwest and California owned by the Ridder family. Through three generations this family has observed a set rule in expanding its empire: only buy papers in cities where there is no competition, and station a Ridder at every paper to watch over the investment

Walter Ridder, publisher of the Post-Tribune, is of a different mold from the rest of his family; he is considered a liberal, and he is the only family member primarily interested in the news; for years, in fact, he wrote a political column from Washington. In 1966, however, he quit the column to become publisher of the Post-Tribune. It was a cur ious decision. At fifth, Ridder was almost deaf and in poor health and he insisted on commuting to Gary from his home in Washington. Moreover, he is a man with a profound distaste for tension and controversy, and life in the company town that U.S. Steel built in 1906 had little else to offer him.

In 1966, the city was still controlled by Chacharis' political machine. The following year the city's population shifted to a black majority and elected Richard Hatcher, a thirty-six-year-old lawyer, the first black man to become mayor of a major American city. With Hatcher in office, Ridder appeared to be seized by the belief that a race riot was

about to erupt. He arranged with Hatcher to have a "hot line" hooked up from the mayor's office to Ridder's apartment in the Hotel Gary. The publisher also ordered a moratorium on any news that was highly critical of the new black mayor, fearing it might increase racial tension in the city. But his editors ignored or underplayed the positive and often nationally interesting stories about the new mayor's administration, and the tone of the paper's reporting soon came to reflect the attitude of its senior political reporter, Guy Slaughter. "You can't help but be prejudiced," Slaughter said the first day I arrived on the job. "The only whites Hatcher will talk to are subversives." Hatcher responded by not granting interviews to Post-Tribune reporters.

I had known Ridder in Washington, and when I finished college and the Marines I went to see him about a job with his Gary paper. He agreed, and in conversations with my wife Anne and me, he treated us like allies signing up to go into enemy territory with him. In Gary, he made sure I was given interesting assignments, and he backed me up on the controversial stories I wrote. One such story was on U.S. Steel's gigantic Gary Works which comprises half the taxable property in the city. The Post-Tribune article had suggested that the corporation might be trying to conceal the value of its plant, and there were reasons to suspect this was the case. During the 1960s alone, for example, more than a billion dollars in improvements were added

to the Gary plant, yet its assessment increased by only $25 million, and by 1971 the mill's tax assessment was only $173 million.*

The story infuriated the superintendent of the Gary Works, J. David Karr, and he resp onded in a later interview with an apparent threat: "How far can you push me? I'm not asking for a fight with the paper, but a newspaper is a business. It doesn't exist in a vacuum. It's got to have a relationship with U.S. Steel. What would happen to it if it were to lose money? You ever heard of that?"

By the time I arrived in Gary, Hatcher's administration had brought a social revolution to the city. In fact it had become a kind of urban laboratory for virtually every major inner-city program available in the country; more than $100 million had poured in from the federal government alone, and Hatcher had initiated an across-the-board reform of the city government. Still, Hatcher's administration had failed to meet two major challenges: to neutralize the machine's power and to force a fair revaluation of U.S. Steel's taxable property. The consequences of these failings became apparent in late 1970 when Gary's school superintendent

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* Tax assessments in Indiana are set by state law at one third of true cash value. The full value of the plant, according to this formula, is then $519 million.

called for an end to physical education and music classes and warned that there might not be enough money to keep the schools open throughout the year. It was the first of a succession of financial crises to hit the city's bankrupt schools and government, both of which rely on property taxes for funding.

The impasse seemed about to break in November 1970, when Ralph Nader became interested in Gary. Nader was answering a call for help from a community organization set up by the late Saul Alinsky. Composed of white workingpeople in Lake County, the Calumet Community Congress (CCC) attracted Nader's attention because of its interest in challenging U.S. Steel's tax assessment and pollution.

At the CCC's first meeting, 1,500 people-from truck drivers and housewives to steelworkers and students-- listened to Nader's associate, John Esposito, as he pledged to investigate U.S. Steel. They then voted to commit their new organization to fight political corruption and industrial abuses in the county. Unconsciously the organization of hardhats had declared war on all of Hatcher's foes ... and just on the eve of his reelection campaign.

It ain't beanbag

When the city dump started to burn out of control in January 1971, everyone knew that the campaign had begun in earnest. The dump was located in the center of a residential district, and arsonists set fire to it with persistent regularity and considerable

embarrassment to Hatcher throughout the spring. There were other signs of the beginning of the campaign. A crime wave hit the city about the same time and ended, like the fires at the dump, on Election Day.

Also in January, the township trustee, a machine loyalist who administered emergency welfare grants, started to force poor relief applicants to sign cards pledging their support to the machine mayoralty candidate, Dr. Alexander Williams, a light-skinned Negro who was al so the county coroner. Hatcher had told the Post-Tribune's City Hall reporter about the trustee's actions and offered him a pile of signed statements from welfare applicants as proof. The reporter refused to take them. I did take them, and my story forced the trustee to put an end to the pledge cards, but both he and Dr. Williams made charges on radio talk shows that I had been biased because my wifeworked at City Hall. Anne was indeed working there, but Ridder had given his approval to her taking the job, and had said it wouldn't affect my assignments. He had a change of heart, however, when the controversy arose. The next day, the Post-Tribune's editor, in telling me that I could no longer write stories that dealt with the campaign, explained "The paper, like Caesar's wife, must be beyond reproach."

I was disturbed because I knew there would be other controversial stories emerging as the campaign heated up, and there was no

assurance that there would be anyone to write them. But I had my hands full covering the CCC, and by then I had started to look into U.S. Steel's tax assessment.

Nader's property tax specialist, Sam Simon, had contacted me about investigating the steel mill at the time the CCC was being organized. He hoped I would do the research and feed it to Nader for a possible law suit. In a fit of enthusiasm for the cause, I was agreeable to this, and was puzzling over how to go about it when Henry Coleman, Hatcher's campaign manager, called with a suggestion.

Coleman had managed campaigns for black candidates in Gary since the 1930's; first for and later against the machine. He is a short man in his late fifties with a soft, almost apologetic manner who carried a former Mafia muscleman about with him as a body-guard. Coleman knew I was trying to get a handle on the U.S. Steel story through Fadell, and he was eager to help me expose Hatcher's chief political foe. "There's a fellow here who just got fired by Fadell and he's pretty mad," Coleman told me on the phone. "Why don't you come over and have a talk with him."

The man in Coleman's office, Wilbur Salib, had been an IRS auditor got nineteen years when he wrote an unfavorable evaluation of his supervisor and was promptly charged with violating IRS rules by preparing income tax returns for a fee. Fadell who was then being investigated by the IRS, hired the job-less accountant, hoping he could learn IRS

procedures from him. Although Salib then served the assessor loyally for several years, Fadell had now fired him without notice. Salib said he could tell me a great deal about the inner workings of the assessor's office and perhaps something about U S. Steel too, but that heneeded a job if he were going to talk. Coleman immediately hired him as a street in-spector, and the new city worker spent all his off hours for the next few months helping me investigate Fadell.

Compared with what we discovered later, the practices Salib told me about the first time we talked were trivial: employees re-ceiving extra pay at the public's expense so they could purchase tickers for fund-raising dinners, a "Flower Fund" into which the assessor's employees kicked 2 per cent of their salaries for Fadell's personal use, bloated mileage claims with percentage kick-backs to Fadell, and similar illegalities. Salib was sure there was far more to the story than this, however, and suggested we go to the County Court House and look through the duplicate assessment records kept on file in the auditor's office.

When I read through the assessor's pay-roll records for the past few years, I found that Fadell's average sixty-man payroll was laden with political appointees and personal retainers. The most prominent of these was Oral Cole s old adversary and Fadell's former protector, George Chacharis. In addition, twenty-four precinct committeemen or wives of committeemen, a minister, several of

Fadell's relations, and two of Fadell's law partners were receiving paychecks from the assessor. A further review of the records from the preceding few years revealed remarkable payroll increases during the weeks prior to elections when Fadell was running for office. When he ran for mayor in 1963, for instance, he hired more than 1,000 temporary employees; in 1966, when he was running for assessor, he hired more than 750. Later I established that all these people hired to campaign for Fadell were p aid with government funds. In 1966 alone. the cost of subsidizing the assessor's campaign workers was $37,500.

From the payroll records, Salib and I went into the value where the assessment records are kept. To our mutual surprise, we immediately spotted another unmistakable pattern. The assessments of numerous corporations had been mysteriously reduced in the years after Fadell became assessor in 1958. For example, valuations of seven properties of the privately owned water company in Gary were reduced from $257,765 to $37,690 in one year. This meant a reduction of about $31,000 in the company's annual tax bill. Over a ten-year period this would amount to more than a $300,000 tax reduction. Hundreds of other corporations in the city were also receiving massive tax reductions.

After leaving the Canty Court House the first day, I interviewed a number of the assessor's Election Day employees and got them to sign statements saying they had received checks from the assessor's office for political

work. This evidence, along with the other payroll abuses and Salib's testimony, was probably enough to send Fadell to jail if it could be presented in court outside Lake County.

But then, learning of my investigation from an employee, Fadell counterattacked. He gave a statement to the city's two ra dio stations: "The result of an investigation I have conducted prove conclusively that the Post-Tribune has in its employment a paycla reporter, George Crile, who is actively working in the Hatcher campaign. Crile has been running around during working hours with City Hall employees attempting to concoct false rumors about me, the assessor, because I am for Dr. Williams in the mayor's race. Crile's wife works at City Hall and is receiving merchant checks from the controller's office. What other checks are the Criles receiving," asked Fadell, "and what k'nd of merchants are the Criles anyway..."

It was shortly after this that I met Oral Cole through Salib, who had known him in the IRS. Following the agent's leads, I started to visit the enemies Fadell had made during his career, as well asanumber of his current employees, and businessmen throughout the city.

What emerged was the apparent fact that Fadell was primarily a businessman, even though his varied and extensive ventures were hidden by secret trusts and other legal ruses. His confidential secretary had at one time been an officer in more than eight different corporations, most of which I believed served as

conduits to channel money. Other employees and relatives also participated in the assessor's complex deals. In more recent years, he had branched out into a variety of conventional businesses, which I listed along with his known holdings in the series of articles that I intended for publication in the Post-Tribune. Among Fadell's assets, I wrote, were "three trucking companies including one with a $618,000 contract with the city of Chicago - a trailer park - a mobile home sales company - a law practice with some of the township's large property owners as clients - extensive real estate holdings in Lake and Porter Counties, including two lakefront homes - and a motel in Miami, Florida.

Working with Salib at the County Court House I learned to interpret different patterns in the assessment records. For instance, when a corporation's assessment experienced a major and unexplained drop, it was safe to conclude that some form of business arrangement had been worked out with the assessor. If, on the other hand, there was a major unexplained increase followed by appeals to the state tax board, it probably meant that the corporation in question was being run by a man of principle. Following this rule of thumb, I went to the latter corporations to inquire about their dealings with the assessor. This is one of the stories I was told:

In 1960 Robert Roy, then general manager of Gary Screw and Bolt Co., was approached by Calumet Township Assessor Tom Fadell with the advice that it would be "wise" for Roy's company to start selling some of its scrap metal below market price to a junk dealer friend of Fadell's.

In a recent interview, Roy recalled that Fadell "indicated the company's assessment need not be increased if such an arrangement could be worked out." When Roy refused to accept the offer, Fadell raised Screw and Bolt's personal property assessment over 400 per cent--from $330,539 to $1,419,365.

At this point the corporation assigned several lawyers to the case and began the expensive process of appealing Fadell's assessment. Although the corporation succeeded in removing over $700,000 from Fadell's assessment, it still ended up with a $330,000 increase...

"He's a rotten type politician; it's amazing he's still out of jail," Roy commented.

Tennis and other hazards

Former boss George Chacharis is, like me, a tennis enthusiast. I had approached him about a game shortly after arriving in

Gary, and we used to play regularly. By the time the campaign was under way, however, other matters had become uppermost in my mind, and I had established a routine in which I would play with him at his private club in South Chicago and then drive over to visit with Oral Cole. The contrast between the old political boss and the man who had sent him to jail was interesting, to say the least.

Chacharis' stock-in-trade was gifts and favors. I tried to avoid them, but he was insistent. First, there was the tennis racket I had left in his car overnight, which was returned restrung in pure gut. Then there was the $250 dinner party at Maxime's in Chicago, and always the stories about Gary. We were friends in a strange way, but there was always a reserve between us, for he knew I was investigating his protege, now employer, Tom Fadell.

It unnerved me one afternoon after Fadell had issued his "payola reporter" release, when the old boss started to call me "partner" throughout a doubles match. He had never done it before, and his smile was too broad and his manner too generous to make me comfortable: "Good shot, partner ... too bad, partner ... we'll get 'em next time, partner." I was thinking about Chacharis' strange behavior as I was driving to Cole's house when a 1957 Chevrolet started to force my car off the Tri-State Highway. The cars behind were traveling at high speeds so there seemed to be no way to stop without having an accident. When the car,

driven by a goateed young man wearing a T-shirt, started across my Volkswagen's front fender, I turned onto the shoulder, slammed on the brakes, and watched as the Chevrolet fish-tailed off the shoulder onto a grassy hill beside the highway. By the time the car caught up with me, I had managed to wedge my VW closely between two fast-moving cars, and after one more pass the driver dropped back and turned off at the next exit.

I didn't know what to think of the incident until I talked to Cole that night at his house. "You better start changing your routes," he advised. "That's the way they do it, you know."

Later there was an anonymous note left during the night on my typewriter in the paper's newsroom. It warned me to get out of the city. Then came the strange conversations with Fadell's deputy assessor, John Svaco. Whenever we met he spoke to me in peculiar riddles. "Hi, Crile," he would say. "You better keep your tool cool, I' just watching out for your safety, you know." Throughout the investigation, Henry Coleman expressed concern for my safety and frequently offered me one of his bodyguards. I half wanted to accept but never did.

Deadlines and elections

I had imposed a deadline for finishing the Fadell series in time for publication before the May 4 primary of 1971. The articles were potentially important to the outcome of the election, for Fadell had become the central figure in a machine effort to steal the election

from Hatcher. The assessor had announced that he had conducted an investigation and found that City Hall officials had illegally registered 3,500 voters. The machine-controlled election board responded to these charges by instituting a challenge procedure that would have required at least thirty minutes for each of these voters to vote. The resulting bottlenecks in the black precincts, where the 3,500 challenged voters were registered and where Hatcher's voting strength was centered, would have effectively halted most voting by Hatcher's supporters.

The election board justified its challenge procedure solely on the basis of Fadell's charges. The articles cast serious doubt on his credibility. They established that the assessor had used his office to solicit bribes, divert public monies for his political as well as personal use, destroy hundreds of volumes of public records, and provide millions of dollars in tax reductions to certain corporations. In addition, they demonstrated that Fadell had manipulated the city's budget process to bring about a financial crisis in the city administration just before the primary elections.

When I turned the series over to Ridder two weeks before the election, there was no question in my mind that it would be published. Throughout the investigation Fadell had refused to answer questions or let me see his assessment records, but there were duplicate records in the county auditor's office and the paper could check them. Further, all of my interviews had been taped. I had even received a loose agreement to have Nader write an introduction to

the series, "Let's not have this be a Nader story," Ridder said protectively. "Let's have it be a Post-Tribune story." I took this as a favorable sign and waited anxiously for a reaction.

A week later Ridder said that the series would have to wait. He said he didn't want it to become an issue in the campaign. He had also decided not to endorse Hatcher, saying that no one had proved to his satisfaction that Dr. Williams was the machine's candidate.

Elections in Gary are pitched battles, employing guns and money, between those trying to steal the election and those trying to save it. This campaign had been enlivened more than usual by repeated bomb threats at City Hall, two fires in Hatcher's car, and shots at his house. Nevertheless, despite the machine's all-out effort and Fadell's personal, rifle-waving intervention at one key polling place, Hatcher won the election by a landslide.

With the election over, I set out to complete my investigation of U.S. Steel's tax assessment. I had left this out of the original series in order to get the articles published before the election. Now, however, I felt the series would be printed and I could go on to U.S. Steel. The investigation posed two major challenges: to find out by just how much the plant was underassessed and to establish conclusively who was responsible for giving the tax break. The first breakthrough came with the discovery of a study made by an economist at a neighboring university. The study wasn't aimed at the mill's assessment, but it included

a breakdown, to the dollar, of the cost of the improvements added to the Gary Works in the last ten years. With this figure, $1,289,320-890, it was possible to determine that the steel mill was underassessed by more than $100 million, with a resulting annual tax break of about $16 million. This estimate was later confirmed by comparing it with the corporation's own statement of the value of its assets in a previously unnoticed foreign corporation's report to Indiana's Secretary of State. In that report, U.S. Steel claimed its Gary Works were worth, after depreciation, $793,991,464. This, if correct, means it is receiving a $15 million a-year tax break, which in turn means that tax bills for the average Gary homeowner have been a full 25 per cent higher than they should have been. Even more damaging to U.S. Steel's claim that its assessment was "grossly excessive and illegal" were the assessments of the businesses in Gary that were not receiving tax breaks. "Compared to U.S. Steel we're really hit hard," Gunner Fog, superintendent of Union Carbide's Gary plant, pointed out. Fog explained that his company's $36 million plant had an annual tax bill close to $1 million. "It seems to me that if we pay $1 million, U.S. Steel ought to pay $100 million. They have billions of dollars invested there."

The second part of the investigation -- determining who was responsible for the tax break -- was not so easy. For, in truth, Fadell had occasionally attempted to raise U.S. Steel's tax assessment. His modest increases were not backed up with adequate documentation, however,

and the state tax board had always overturned them. Fadell thus claimed that he didn't have the power to raise the corporation's tax assessment, even though he said he believed it should be increased. It was a persuasive argument because the tax board traditionally tries to minimize the taxes of major industries in order to encourage investment in the state. I had just about accepted Fadell's argument when I learned that William Sherry, the tax assessor of neighboring Portage Township, had successfully raised Midwest Steel's tax assessment by 50 per cent. This showed that Fadell did indeed have the power to add millions of dollars in revenues to Gary's nearly bankrupt schools and local government. All he had to do was follow Sherry's example. My investigation was finished.

The value of a newspaper

One of the reporters on the paper had warned me not to set my hopes too high on getting any story about Fadell published in the Post-Tribune. I explained to him that the paper and Walter Ridder were two different things and that Ridder would print any legitimate story he knew about. "Before going any further," my colleague suggested, "have a look at the paper's assessment."

There are two kinds of assessments for corporations: real estate, which includes valuations for buildings and land, and business personal property, which includes the value of machinery and inventories. The paper's real estate assessment was $42,000 for the land. The

value placed by the assessor on the building--a several-million-dollar, ten-year-old structure with more than seven miles of pipes and 770 tones of steel sections covering 103,870 square feet -- was $3,700. Even the far smaller and obsolete Hammond Times building in the neighboring township had a $150,000 real estate assessment. With a little digging I found that the history of my paper's assessment presented a disturbing implication.

Under the previous owners and into the first years of the Ridders' ownership, the building's assessment was set at $500 and the land's at $3,000. This was from 1962 to 1969. In the late Sixties Fadell had visited the Post-Tribune to complain about a story about him; when he started to shout threats, the paper's assistant publisher had thrown the assessor out. Infuriated, Fadell went back to his office and nearly doubled the paper's personal property assessment. The paper had no grounds for objection because its assessment had been so low to begin with. In its report to the Indiana Secretary of State, the Post-Tribune set the value of its plant at $3,716,986. Based on this figure, Fadell was still underassessing the paper by about $750,000.

When I had put the paper's assessment history together, I wrote a memo to Ridder, thinking he would be equally surprised by my findings. I suggested that the assessment series should lead with the Post-Tribune's admission of its own tax break, stemming as it

did from the previous owners, followed by a demand that all properties in the city be reassessed. I concluded with a request: "I would like to keep this with you or in a place where no one can find it. Preferably not in your office."

Perhaps I should recall here that my relationship with Ridder was different from that of the paper's other reporters. We had spent many evenings together discussing what could be done to improve the Post-Tribune, and he had taken an active interest in my career. In fact, in the late spring, he offered me a prized job as a Washington correspondent for the fourteen Ridder newspapers. I had accepted with the understanding that I would stay in Gary until the assessment series was printed. Perhaps this explains why I felt the paper's strange assessment history offered an opportunity to get the story across more effectively.

As I had told Sam Simon I would, in April I sent a copy of the series to Ralph Nader, but only after receiving assurances that the material would be kept in confidence. Larry Silverman, one of Nader's young lawyers, flew to Gary to check on the facts and to arrange a law suit against Fadell. Silverman wanted to have the CCC be the plaintiff in the assessment case, and in an un-Naderlike move he gave the CCC's staff director a copy of the series without my knowledge. Before leaving Gary, Silverman successfully enlisted the aid of a public-interest firm in Chicago, Businessmen for the Public Interest, to prepare a law suit to chal-

lenge Fadell and to seek a reassessment of all properties in Gary. The initiation of the suit was to be announced after my articles were printed.

At the same time, Senator Edmund Muskie's subcommittee on Inter-Governmental Relations was preparing to hold public hearings throughout the country to explore abuses in the administration of local property taxes and the need for reform. I sent them a copy of my series and arranged to have Hatcher send an open letter to Muskir with an appeal to hold hearings in Gary. Hatcher had been reluctant to get involved in the assessment controversy during the campaign. U.S. Steel was starting to cut back its work force and continually threatened to pack up its several-billion-dollar plant and move elsewhere if its taxes continued to rise. Unrealistic as the threat may have been, Gary's steelworkers took it seriously, and the last time Hatcher had tried to challenge the mill's assessment, the paper had called it a "reckless" move. He was willing to send the letter but only after the series appeared in print.

The coordinated attack on Fadell was readied. All that remained was for Ridder to give the goahead for the series to begin. But the publisherwas spending less and less time in Gary, and on his infrequent trips he would say only that he was looking the series over. Finally, word came from Ridder that he wanted the series rewritten. The paper's managing editor told me: "Walter wants to keep the

story exclusively on the topic of assessments," meaning no reference to any of the illegal activities Fadell was involved in. Also, I was told that the sections on the paper's own assessment would have to go. I wrote Ridder complaining about his instructions, thinking they might have been misunderstood by the editor. His response to my protest was to ignore the problem. The series gathered dust over the summer.

By August, the city was filled with rumors about the stories. In the course of the investigation I had interviewed as many as 100 people, and they were starting to ask if the paper was suppressing my article. When the CCC staff director who had been given the series by Nader lawyer began to tell people what was in it, I had my first blowup with Ridder: in a "Dear George" letter he angrily accused me of disloyalty for having spread rumors that the Post-Tribune had been making deals with Fadell, which, he said, was not true.

The letter took me by surprise, because it was not like Ridder to take such a strong stand on anything and because his accusations were untrue. It was true that my investigation and the Nader leak of the series to the Alinsky people had stirred up the controversy. But it was almost four months since I had turned in the articles, and the controversy never would have started if the paper had printed any of them. I wrote an equally strong letter to Ridder and waited for a response.

He wanted to have dinner. We went to a quiet Greek restaurant in Gary. He said it had all been a misunderstanding. There had been a breakdown in communications between the editors and myself. He wanted to get the articles published even more than I did, and it would be done right away. In turn, I said I was sorry for the embarrassment that the leakage of my stories had caused Ridder as well as the Post-Tribune. A week later I left Gary for my new job as Washington correspondent for the Ridder papers.

Then the long wait began -- September, October, November -- with assurances from Ridder in Washington that the articles would be printed. One day he called me into his office and showed me a "rewritten version" of the articles and asked if I would be willing to have my by-line on it. "There are built-in inequities in Indiana's tax system, and there will be abuses until there is legislative reform." That was the message. Gone were the references to tax reductions, bribes, and buried public records. It was a white-wash, and I said my name couldn't be used.

The CCC had by then started a weekly newspaper, The Catalyst, and I called the editor, George Bogdanich, a former editor of the University of Wisconsin daily, and told him that I would let him use my research once his paper was incorporated but only if I became certain the Post-Tribune would not print the assessment articles.

I went to the Washington bureau chief and told him I was considering giving the articles to The Catalyst. Soon after this, Ridder asked me to rewrite the story again. It was January of 1972 when he read the new version and said that he was going to go to Gary to confer with his editors once more about the series. It was always once more with Ridder, but he was then recovering from a pulmonary embolism and the stories were wearing him down. I believed him when he said that a decision would be made within a week.

It had been a long haul -- almost nine months since I had turned in the series -- but I now had hopes that it would at last be printed. That night, after I talked to Ridder, the editor of The Catalyst called to say that his paper had been incorporated and asked if he could use the series. I told him no, but that he should call back the next week after Ridder had returned from Gary with his decision.

Ridder arrived in Gary at the same time The Catalyst hit the street with its 500 copies carrying a headline story on the Post-Tribune's suppression of the assessment articles complete with several excerpts from my series, copies of which had been turned over to the CCC by Nader's lawyer. Bogdanich, thinking the Post-Tribune was about to publish the articles, wanted to make it look as if The Catalyst had forced Ridder to publish them.

I was at work in Washington when the call came from Ridder.

"George," he said, "there's a new paper out here called The Catalyst."

"Yes, I know." A friend had called the night before to warn me that Bogdanich had printed something about the series. I still didn't know what.

"This is really bad," Ridder said gravely. "There are things in here which could only have come from you. This is a serious breach of confidence ... I'm sorry but I think it would be best if you left the Washington bureau. I just no longer feel I can trust you."

I was fired. Then everything else started to crumble. A major scandal developed in the Chicago assessor's office and the Businessmen for the Public Interest decided to drop the Gary case in favor of dealing with the problem in their own backyard. Muskie's subcommittee hadn't started its hearings and might not, and the Nader lawyers had moved on to uncover new injustices elsewhere.

Then, too, the combined effects of the tax breaks and Fadell's manipulation of the city's tax rates had left the schools with only $23 million in revenue to cover a $43 million budget. School Superintendent McAndrew moved to stave off the inevitable announcement of bankruptcy by ordering the dismissal of more than 200 teachers and janitors and cuts in pay for everyone else. The confused and angry teachers voted to strike the next day.

The cause of this fiscal crisis was simple, Fadell stated in a press release on the school crisis. It was brought about by the excessive spending and inept management of the school superintendent. The paper printed Fadell's charges without comment. Later Ridder had the paper print the "rewritten" assessment story I had refused to have my name associated with, and then he resigned as publisher of the paper and left Gary for good.

Former IRS agent Cole was not surprised when I told him what had happened. He acted as if he'd expected it all along. "Well, you remember I told you I didn't trust the Post-Tribune." Switching subjects, he then told me what had happened to a woman he had been working with who had infiltrated a Mafia boss's house in Gary. She had been keeping Cole informed of what she observed.

" You remember Sally?" he asked.

"Yes, I remember her. Why?"

"She was just killed. It was a car accident. She was run off the road."

I said goodbye to Oral, but there was still one thing left that I had to do to satisfy my curiosity.

I had to go back to Gary to the auditor's office to look over the new assessments that had been made in the spring after I was fired. There were few surprises. There was the same token assessment for the Post-Tribune's real estate -- but then I looked at the paper's business property assessment. It had been $460,000 in 1970, and now, in 1972, it was $310,000.

APPENDIX E

SUMMARY OF ARGUMENT

Since 1964 when this Court completely changed the status of the law of libel where a public official is involved no definitive statement has evolved which sets forth the district court's function when reviewing evidence upon a defendant-author/publisher's motion for summary judgment. The circuit courts have extrapolated portions of several decisions of this court, and have fashioned a number of statements regarding how the district court is to view the evidence and what degree of proof is required of a defamed public official plaintiff in order to avoid summary dismissal. However, these various statements have created not one definitive standard, but a spectrum of standards.

The standard imposed in the present case by the courts below was the highest burden of proof possible, i.e., that for purposes of summary judgment, the public official plaintiff must actually prove, with clear and convincing clarity, that the defamatory statements were published with knowledge of their falsity or with reckless disregard to whether they were true or not. Petitioner submits that such a standard is the ultimate burden of proof which the plaintiff must meet at trial, but not the correct standard to be imposed upon him at the summary judgment level of the proceedings, as demonstrated in numerous cases cited in this Petition.

Secondly, Petitioner requests that this Court review the decisions below because the lower courts erroneously disregarded specific and numerous offers of proof which case law precedent has previously held sufficient to show "actual malice" for purposes of summary judgment. By rejecting proof such as unequivocal refutations by sources of the author who state they never made statements attributed to them or that what they did say was twisted and distorted into a defamation, and evidence that the author used a publication to "grind a personal axe" against Petitioner and was "out to get him,", the lower courts have so completely emasculated the holding in New York Times v. Sullivan that the question which must now be raised is whether a public official ever has recourse against an author/publisher for defamatory falsehoods.

Petitioner further submits and provides this Court with examples to support his position that at the summary judgment stage of litigation, a court may not disregard approximately fifty affidavits, public records, the authors own tape recordings, and other evidence which could lead a jury to find publication with "actual malice". By doing so in the present case, the lower courts here have taken the one final step which this Court has deliberately and carefully determined must not be taken -- absolute immunity of the press.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-393

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Petitioner,
v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is unreported and appears as Appendix A to the petition for certiorari. The opinion of the district court is reported at 425 F. Supp. 1075 and appears in Pet. App. C at

1-35. The findings of fact and conclusions of law entered by the district court appear in Pet. App. C at 36-126.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1977. The petition for certiorari was filed on September 13, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in this libel case brought by a public official, the district court and the court of appeals properly granted summary judgment for respondents.

STATEMENT OF THE CASE

Introduction

This libel action was brought by petitioner, Thomas R. Fadell, who, since 1959, has been the tax assessor for Gary, Indiana. The suit was based on an article which appeared in the November, 1972 issue of *Harper's* Magazine entitled "A Tax Assessor Has Many Friends." Respondents are the author, George Crile, his wife, the Minneapolis Star and Tribune Company, of which *Harper's* is a division, and three individuals associated with the Company and *Harper's*.[1]

[1] The three individuals are John Cowles, Jr., President and Board Chairman of the Minneapolis Star and Tribune Company, Inc., *Harper's* Magazine Publisher Russell Barnard and *Harper's* Editor-in-Chief Robert Shnayerson.

On the basis of the record developed during extensive discovery, respondents moved for summary judgment, relying upon *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). The district court granted the motion and wrote a memorandum opinion and entered detailed findings of undisputed facts and conclusions of law. The court of appeals affirmed, adopting the district court opinion,

> "including the conclusion that 'a careful review . . . (of the record) reflects no actual malice whatsoever as that term is contemplated in *New York Times* v. *Sullivan* and its progeny.'" Pet. App. A at 5-6.

Statement of Facts

The author, respondent George Crile, began research on the article in question while working as a reporter for the *Post-Tribune* in Gary. After initial interviews with a man who had formerly worked for Fadell in the Tax Assessor's Office and with a special agent of the Internal Revenue Service, Crile began an extensive and wide-ranging investigation into Fadell's practices as assessor. He interviewed at least 60 people, including, as the district court observed,

> "a large number of public officials, leading citizens and experts with respect to tax assessments in Gary, political conditions in Gary and election events in Gary." Pet. App. C at 7, n. 3.

He reviewed numerous tax assessment records and other public documents relating to operations of the Assessor's Office. He interviewed at least eight former employees of the Assessor's Office.

The picture which emerged, and which is portrayed in the article, was a shocking abuse of the Assessor's Office. Crile learned that Fadell required employees to kick back a percentage of their salary into a fund he maintained; he used employees of the Assessor's Office for personal and political tasks; he padded the payroll with hundreds of temporary employees in election years;[2] and he used the Assessor's Office to conduct a private business from which he received extensive revenues. Pet. App. C at 93-100.

The most important area of Crile's research concerned Fadell's assessment practices. He found numerous instances of mysterious and unexplained assessment reductions. Documents made available by an IRS agent provided an explanation for many of those reductions. They reported instances of solicitation of bribes or kickbacks in exchange for favorable assessment treatment. They contained examples of companies which, after making payments to Fadell or his businesses, received lowered assessments. Crile

[2] Crile obtained signed statements from certain of these workers affirming that they were on the Assessor's payroll but did no assessment work. Other people told Crile in tape recorded interviews that the people on the padded payroll were hired to do political work for Fadell. Pet. App. C at 100-105.

personally verified certain of those cases by obtaining tape recorded interviews with people approached for bribes.[3]

On the basis of that research, Crile wrote a series of articles for the *Post-Tribune*. However, before the articles were published, Crile was fired. Crile later brought the articles to *Harper's*. After reviewing them and looking into Crile's reputation and qualifications, *Harper's* commissioned Crile to write the article in dispute, which was in part derived from the original articles and in part based on additional material. The article was reviewed before publication in detail by *Harper's* editors and by Harper's counsel, all of whom concluded that it was fair and accurate. It was published in the November, 1972 issue of *Harper's*. Pet. App. C at 2-19, 36-41.

Proceedings Below

After the article was published, Fadell filed this action complaining that numerous passages were libelous. Extensive pre-trial discovery ensued. Depositions of 23 witnesses were taken. Crile was interrogated for eight days and the transcript of his deposition covers 1,443 pages. He responded to 341 interrogatories and produced for Fadell's inspection all of his notes and tape recordings of interviews.

[3] The district court's Finding No. 30, which covers seven pages (Pet. App. C at 60-67), describes in graphic detail the undisputed facts available to Crile concerning bribes, kickbacks and shakedowns.

After Fadell completed discovery, respondents moved for summary judgment. Crile attached as an appendix to his motion seven volumes of exhibits which contained the sources for each of the disputed statements in the *Harper's* article.[4]

After receiving extensive memoranda analyzing the evidence, the district court granted summary judgment for respondents. The court carefully reviewed the scope and depth of Crile's investigation. It entered extensive findings of undisputed facts which analyzed the basis for each statement alleged to be libelous. Summarizing the evidence it said:

> "the Court finds that, based on the undisputed facts in this record, Crile had support, either from interviews, or documents or both for each of the disputed statements and it further finds that there is no evidence that at the time of publication, Crile knew that any statements were false or entertained any doubt as to the truth of the statements." Pet. App. C at 54.

Likewise the court reviewed the careful editing of the article by *Harper's* (Pet. App. C at 2-19). The court found that there was no evidence that *Harper's* or anyone associated with it knew any statement was

[4] Volumes I through III, covering 1,128 pages, consist of Crile's interview notes. Volume IV consists of 418 pages of tape recorded interviews. Volume V contains 285 pages of Internal Revenue documents provided to Crile. Volumes VI and VII contain 341 pages of miscellaneous documents relied on by Crile in preparation of the article.

false or had any doubts of the accuracy of any statement. (Pet. App. C at 23, 30, 31-32).

The district court found that Fadell had produced no evidence of "actual malice" as defined in *New York Times Co.* v. *Sullivan*, *supra*, and that he "has not raised issues of material fact which, if resolved in his favor, would support a finding of 'actual malice' . . . ." Pet. App. C at 126.

The court of appeals affirmed. It examined the entire record in light of Fadell's contentions and found them meritless. The court adopted the opinion of the district court including the finding that the record "reflects no actual malice whatsoever as that term is contemplated in *New York Times* v. *Sullivan* and its progeny." (Pet. App. A at 6).

ARGUMENT

1. In granting summary judgment for respondents, the courts below applied well-established standards wholly consistent with the decisions of this Court as well as those of other courts of appeals. There is, thus, no reason for this Court to grant certiorari.

The district court made a detailed analysis of the extensive factual record. The undisputed facts, as reflected in the court's Memorandum Opinion and its Findings, demonstrated that respondents had a factual basis, either from interviews, documents or, in most cases, both, for each of the challenged statements made

in the article. There was no evidence that any of the respondents knew or believed any statements to be false or had any doubts as to their accuracy. Thus, the undisputed facts precluded a showing of "actual malice" which Fadell is required to make in order to prevail. *E.g. New York Times Co.* v. *Sullivan, supra, Garrison* v. *Louisiana*, 379 U.S. 64 (1974); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968).

Contrary to Fadell's contention, the courts below did not require that he "actually *prove* the existence of actual malice in order to proceed to trial . . . ." (Pet. 26). The only burden imposed was to raise disputed issues of fact which, if resolved in his favor by a jury, would support a finding of "actual malice." As the courts found, he was unable to do so. The district court said:

> "The Court concludes that the plaintiff has not raised issues of material fact which, if resolved in his favor, would support a finding of 'actual malice' and therefore summary judgment must be granted for the defendants." (Pet. App. C at 126).

Indeed, after the exhaustive discovery conducted in this case including Fadell's microscopic examination of all the source material for the article and his lengthy examinations of Crile and of the *Harper's* editors, executives, and counsel, he was unable to produce *any* evidence of malice (Pet. App. A at 5-6; Pet.

App. C at 23, 30-31). Thus, summary judgment was proper.[5]

2. As a second ground for seeking certiorari, Fadell contends that the courts below ignored evidence of malice which he claims to have produced through numerous affidavits.[6] This argument amounts to no more than a dispute, resolved against him by two courts below, over the factual materials in the record.

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[5] The standard applied was not only consistent with Rule 56, Fed. R. Civ. P. but also with numerous cases holding that summary procedures are particularly favored in the First Amendment area because of the chilling effect of even ultimately unsuccessful libel actions. *See, e.g., Thompson* v. *Evening Star Newspaper Co.*, 394 F.2d 774, 776 (D.C. Cir.), *cert. denied*, 393 U.S. 884 (1968); *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). See also, *Grzelak* v. *Calumet Publishing Co.*, 543 F.2d 579 (7th Cir. 1975); *Gospel Spreading Church* v. *Johnson Publishing Co.*, 454 F.2d 1050 (D.C. Cir. 1971); *Medina* v. *Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971); *Miller* v. *News Syndicate Co.*, 445 F.2d 356 (2nd Cir. 1971); *Sellers* v. *Time, Inc.*, 423 F.2d 887 (3rd Cir. 1970), *cert. denied*, 400 U.S. 830 (1970); *Time, Inc.* v. *Johnson*, 448 F.2d 378 (4th Cir. 1971); *Bon Air Hotel* v. *Time, Inc.*, 464 F.2d 986 (5th Cir. 1972); *United Medical Laboratories, Inc.* v. *CBS*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969).

[6] Fadell argues that he proved, through affidavits, that a number of Crile's sources denied that they were sources for the disputed statements in the article. (Pet. 29). The record shows that in no case did any source deny making a statement which Crile attributed to him. In its Memorandum Opinion and its Findings of Fact and Conclusions of Law, Pet. App. C at 1-126, the district court dealt extensively with the affidavits submitted by Fadell and properly found that they contain no evidence of malice.

Not only is it without merit, but this is not an issue of sufficient importance to cause this Court to grant certiorari.

Fadell cites four instances in which he claims to have produced evidence of malice on the part of Crile.[7] However, a review of the district court's findings demonstrates that the court considered all of the "evidence" submitted by Fadell and correctly concluded that he did not raise issues of fact on the question of malice.

(a) Fadell claims that Crile knowingly published a false figure for the assessment of the *Post-Tribune* building in an effort to establish a relationship between the paper and Fadell. In Finding No. 35, covering five pages, (Pet. App. C at 78-83) and Conclusion No. 9, (Pet. App. C at 125) the district court reviewed the undisputed fact that Crile obtained the figure used in the article from an assessment record which he, and a former employee of the Assessor's Office, believed to be for the *Post-Tribune* building. He reported the figure to the publisher of the *Post-Tribune* who never denied or corrected it. He was refused an opportunity to review the *Post-Tribune* tax

[7] Petitioner does not attempt to dispute in any respect the conclusion of the district court that "Harpers . . . not only had no knowledge that any statement in the article was false; it is clear that Harper's did not entertain doubts respecting the truth of any statements, and had no awareness whatsoever of probable falsity of any part of the article." Pet. App. C at 23; see also 38-41.

records and he was never given the correct figure. Although the figure used was later shown to be inaccurate, the courts below properly found that there was no evidence of malice.

(b) Fadell claimed that Crile recklessly mischaracterized a reduction in the assessed value of properties owned by a water company. In Finding No. 29, covering two pages, (Pet. App. C at 57-60) the district court found that it was undisputed that Crile took the assessment figures appearing in the article from public records and confirmed his conclusions as to the effect of those assessments through at least two interviews.

(c) Fadell claims that Crile acted with malice in stating that Fadell had the power to increase the assessment of the United States Steel plant in Gary. Finding No. 33 (Pet. App. C at 70-75) reviewed the numerous sources Crile relied upon for this conclusion.

(d) Fadell claims that Crile acted recklessly in stating that he had destroyed records of the Assessor's Office. Finding No. 37 (Pet. App. C at 87-93) sets forth the undisputed facts on this issue including excerpts from five tape recorded interviews with people involved in the destruction.

Thus, in each instance, the court considered the "evidence" offered by Fadell and found that it did not raise disputed issues of fact on the question of malice. As the court of appeals observed:

"We note finally that although plaintiff attempts to surmount the obstacles imposed by *New York Times*, his major thrust continually goes to the truth or falsity of the published statements rather than to the basic problem of whether they were published with actual malice." Pet. App. A at 6.

CONCLUSION

For the foregoing reasons, respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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